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(3)

In The Supreme Court Of The United States

OCTOBER TERM, 1999

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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FILED
UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 27, 1999

No. 99-1
CA-96-529-3

MICHAEL WAYNE WILLIAMS

Petitioner - Appellant

v.

JOHN B. TAYLOR, Warden, Sussex I State Prison

Respondent - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

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Page(s) A2 missing in original document

the way out of the house Williams informed Mrs. Keller that he planned to burn the house. Upon Mrs. Keller's request, Williams accompanied her back inside to get the Kellers' marriage license.

With Williams carrying the .38 and Cruse the .357, the two men walked the Kellers down a dirt road and into a thicket. Williams then took up a position directly behind Mr. Keller and Cruse stood behind Mrs. Keller. Williams said, "We'll shoot at the count of three." At the count of three, Williams shot Mr. Keller, who fell to the ground. Cruse did not fire. Williams turned to Cruse and told him to shoot. After Cruse shot and Mrs. Keller fell, Mr. Keller stood up again. Williams then shot him a second time. As Cruse began to walk away, [*4] Williams said, "Wait . . . . What if they ain't dead?" Williams then approached the Kellers and shot each a few more times.

Williams and Cruse next returned to the house, where they loaded the Kellers' Jeep Cherokee with their television set, microwave oven, stereo and speakers, and shotgun. After loading the Cherokee, the two men set fire to the house.

The next day Williams and Cruse sold some of the property they had taken from the Kellers. They then threw the remaining property and the .357 into the Rappahannock River and set fire to the Cherokee.

When James heard about the fire at the Kellers' house, she contacted the police and informed them that she had deposited Williams and Cruse near the house on the night of the fire. The police interviewed Cruse, who was unresponsive until the police located the bodies of Mr. and Mrs. Keller.

After consulting counsel, Cruse agreed to a plea bargain pursuant to which he would disclose his knowledge of the crimes in exchange for a promise from the Commonwealth not to seek the death penalty. Cruse then gave a statement in which he explained the events of the fateful night in detail, with the exception of Cruse's own participation in the [*5] rape of Mrs. Keller. Upon learning of Cruse's falsehood, the Commonwealth revoked its plea agreement with Cruse and later indicted him for capital murder.

Williams was indicted for the capital murder, robbery, rape, and abduction of Mrs. Keller; for the capital murder, robbery, and abduction of Mr. Keller; for capital murder based on two related homicides; statutory burglary; and arson. At trial in January 1994, Williams took the stand in his own defense. He confirmed significant parts of the Commonwealth's case. In particular, he indicated that he was the one who suggested robbing the Bear Creek Market, that it was his suggestion to set fire to the Kellers' house, and that he shot Mr. Keller in the head. He contradicted portions of the evidence presented against him, most of which was in the form of testimony by Cruse. Specifically, he denied that he also raped Mrs. Keller, that he fired any shots other than the first one, and that he was the instigator at various other points during the commission of the crimes.

The jury convicted Williams of capital murder. It then recommended the death sentence on the basis of Williams' future dangerousness and the vileness of his crimes. The [*6] trial court agreed with the jury's recommendation and sentenced Williams to death. The Supreme Court of Virginia affirmed the conviction and sentence, *Williams v. Commonwealth, 248 Va. 528, 450 S.E.2d 365 (Va. 1994)*, and the United States Supreme Court denied certiorari, *Williams v. Virginia, 515 U.S. 1161, 132 L. Ed. 2d 858, 115 S. Ct. 2616 (1995)*.

Williams then filed a petition for state habeas and moved for discovery, an evidentiary hearing, and expert assistance. The Supreme Court of Virginia denied these motions and the petition, stating without explanation that Williams' claims were meritless. The United States Supreme Court again denied certiorari. *Williams v. Netherland, 519 U.S. 877, 136 L. Ed. 2d 136, 117 S. Ct. 200 (1996)*.

Next, Williams filed a petition for habeas corpus in the United States District Court for the Eastern District of Virginia. The district court granted Williams an evidentiary hearing on three of his claims and dismissed the rest. Because Williams filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, this [*7] court entered a stay and instructed the district court to reconsider its grant of an evidentiary hearing in light of *28 U.S.C. § 2254*(e) as amended by that Act. After applying the AEDPA, the district court denied Williams' request for an evidentiary hearing and dismissed his petition in its entirety. Williams now appeals.

II.

Williams maintains he was entitled to an evidentiary hearing in the district court to establish several claims. Two of those claims arise under the Sixth Amendment. First, Williams claims that one of the jurors failed to answer honestly questions put to her on voir dire. See *United States v. Bynum, 634 F.2d 768 (4th Cir. 1980)*. Specifically, Williams contends that juror Bonnie Stinnett failed to disclose that she had once been married to Deputy Sheriff Claude Meinhard -who would testify for the Commonwealth -- when Stinnett was asked whether she was related to any witness in the case.

Williams also maintains that Stinnett withheld the fact that prosecutor Robert Woodson had represented her in her divorce proceedings. Second, Williams claims that the prosecutor improperly failed to correct the dishonest juror. Williams [*8] argues that Woodson failed to disclose both of these pieces of information and thereby violated his right to a fair trial. See *United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993)*.

With respect to his other claim, Williams maintains that the Commonwealth failed to provide him with exculpatory evidence as required under *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*. In particular, Williams claims that the Commonwealth failed to disclose a psychiatric evaluation that indicated Cruse had little specific recollection of the events surrounding the Keller murders.

A.

The district court denied Williams an evidentiary hearing on these claims. Section 2254(e)(2) provides:

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --

(A) the claim relies on --

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through [*9] the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). The district court held that whatever else Williams could show, he could not demonstrate actual innocence as required by section 2254(e)(2)(B).

Williams argues that the district court erred in applying section 2254(e)(2) to his request at all. He maintains that section 2254(e)(2) applies only when the petitioner "has failed to develop the factual basis of a claim in State court." Id. (emphasis added); see also *Cardwell v. Greene, 152 F.3d 331, 337* (4th Cir.), cert. denied, *142 L. Ed. 2d 491, 119 S. Ct. 587 (1998)*. According to Williams, he did not "fail" to develop the factual foundation for any of these claims in state court. Williams argues that he had no way of knowing the specific facts underlying his claims. This is especially true, Williams maintains, because the Supreme Court of Virginia denied his requests for discovery, [*10] a hearing, and expert and investigative assistance. Williams contends, therefore, that section 2254(e)(2) should not apply to his request for a hearing in district court.

We disagree. To escape the requirements of section 2254(e)(2), a petitioner must "diligently . . . develop the factual basis of" his claim in state court. *Cardwell, 152 F.3d at 337*; see also *Wright v. Angelone, 151 F.3d 151, 164 (4th Cir. 1998)* (in order to obtain evidentiary hearing petitioner must show "why the factual predicate for this claim could not have been discovered earlier"). Ignorance in and of itself is not sufficient to show diligence; that ignorance must be reasonable. See *Coleman v. Thompson, 501 U.S. 722, 753, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991)* (to be excused, legal basis of a claim must not be reasonably available). Nor may a petitioner's requests for investigative assistance, hearings, and discovery on state habeas be vague and conclusory. Rather, a petitioner must tie his requests to his specific claims and state with some particularity the need for assistance. To hold otherwise would permit criminal defendants to avoid the strictures [*11] of section 2254(e)(2) simply by churning out unsupported, boilerplate requests for state court discovery, hearings, and investigative and expert assistance.

Williams clearly has not "diligently sought to develop the factual basis of" his claims for federal habeas relief. *Cardwell, 152 F.3d at 337*. The documents supporting Williams' Sixth Amendment claims have been a matter of public record since Stinnett's divorce became final in 1979. Indeed, because Williams' federal habeas counsel located those documents, there is little reason to think that his state habeas counsel could not have done so as well. Williams' request for investigative assistance was also deficient. He alluded vaguely to "irregularities, improprieties and omissions" with regard to jury selection and asked for an investigator to examine "all circumstances relating to the empanelment of the jury and the jury's consideration of the case." This request in no way alerted the state habeas court to any specific claim. See *Picard v. Connor, 404 U.S. 270, 275, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971)* ("It would be unseemly in our dual system of government for a federal district court to upset [*12] a state court conviction without an opportunity to the state courts to correct a constitutional violation." (internal quotation marks omitted)). The failure to develop the Sixth Amendment claims was thus attributable to petitioner, not to the Supreme Court of Virginia's rejection of a fishing expedition request.

The same is true of Cruse's psychiatric evaluation. In support of his claim that the Commonwealth suppressed the evaluation, Williams provides nothing more than an affidavit from his state habeas counsel attesting to "no recollection of seeing this report in Mr. Cruse's court file." In light of the fact that Williams' federal habeas counsel located the evaluation in this very file, state habeas counsel's failure to see the report is insufficient to demonstrate diligence. Indeed, that failure tends to show that counsel did not act diligently.

Thus, it is clear that section 2254(e)(2) applies to Williams' request for a hearing. It is equally clear that Williams is ineligible for a hearing in federal court under this section. To be eligible, Williams must be able to demonstrate both due diligence and that "but for [the alleged] constitutional error, no reasonable factfinder [*13] would have found [him] guilty of the underlying offense." *28 U.S.C. § 2254*(e)(2)(A)(ii)-(B).

The discussion above makes plain that Williams was not duly diligent. Nor can Williams show that no reasonable factfinder would have found him guilty of capital murder. At trial Williams himself testified that he robbed the Kellers at gunpoint, was at least an accomplice to the rape of Mrs. Keller, and was the first person to shoot Mr. Keller in the head. The Commonwealth's Assistant Chief Medical Examiner, who performed the autopsy on Mr. Keller, testified that each gunshot wound suffered by Mr. Keller contributed to his death. Moreover, although Williams denied that he raped Mrs. Keller, tests on seminal fluid retrieved from her body revealed that some of the fluid could be attributed only to Williams.

Under Virginia law, this evidence was more than sufficient to convict him of capital murder. See *Strickler v. Commonwealth, 241 Va. 482, 404 S.E.2d 227, 235 (Va. 1991)* ("We adhere to the view that where two or more persons take a direct part in inflicting fatal injuries, each joint participant is an 'immediate perpetrator' for the purposes of the [*14] capital murder statutes."); *Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57, 63 (Va. 1980)* (holding that it is only necessary to prove that defendant was immediate perpetrator in the murder and accomplice in the rape to convict of capital murder). In sum, it is not surprising that the district court found that based "on this evidence alone, Williams cannot demonstrate by 'clear and convincing evidence' that no reasonable juror would have found him guilty of the capital murder of Mr. Keller," that "Williams cannot make the requisite showing of 'innocence' under *28 U.S.C. § 2254*(e)(2)," and that "he is not entitled to an evidentiary hearing on his remaining claims."

B.

Even were section 2254 not to apply, Williams would be unable to show his eligibility for a hearing under pre-AEDPA law. See *Cardwell, 152 F.3d at 337* ("If, on the other hand, the applicant has not 'failed to develop' the facts in state court, the district court may proceed to consider whether a hearing is appropriate, or required under [pre-AEDPA law]."). Williams can show neither cause for nor prejudice from his failure to raise the aforementioned Sixth [*15] Amendment and Brady claims in state court. See *Keeney v. Tamayo-Reyes, 504 U.S. 1, 118 L. Ed. 2d 318, 112 S. Ct. 1715 (1992)*.

To demonstrate cause, Williams must establish that "'some objective factor external to the defense impeded counsel's efforts.'" *McCleskey v. Zant, 499 U.S. 467, 493, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991)* (quoting *Murray v. Carrier, 477 U.S. 478, 488, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986)*). As noted, Williams' failure to develop the facts in state court was due to his own lack of diligence. Williams neither brought forth reasonably available facts, nor made reasonable efforts to convince the Supreme Court of Virginia that additional discovery was warranted.

Williams is also unable to demonstrate prejudice. In order to do so, he must show that, absent the alleged constitutional violation, the outcome of the case likely would have been different. See *Carrier, 477 U.S. at 494*. As we have indicated, Williams' trial testimony alone was enough to convict him. See *Fitzgerald v. Greene, 150 F.3d 357, 366* (4th Cir.) (finding no actual prejudice based on overwhelming evidence [*16] of guilt, future dangerousness, and vileness of crime), cert. denied, *142 L. Ed. 2d 321, 119 S. Ct. 389 (1998)*. Moreover, Williams' claims with respect to juror Stinnett were marginal. It is hardly clear that Stinnett was related to Deputy Sheriff Meinhard given that the two divorced some fifteen years before Williams' trial. Furthermore, Meinhard's testimony was brief and did not speak to the critical facts of the trial. In fact, Williams' trial attorneys saw no need to cross-examine him. And the prosecutor explained his failure to notify the court of the relationship in an affidavit in which he stated that he simply did not remember being involved in Stinnett's divorce -- a plausible claim given that the divorce occurred fifteen years prior to Williams' trial and was uncontested. Finally, it is anything but clear that a divorce from one of the Commonwealth's witnesses would predispose a juror toward the Commonwealth's case.

For all of these reasons, the district court properly denied Williams' request for an evidentiary hearing.

III.

Williams next challenges the district court's dismissal of two claims on which the Supreme Court of Virginia found against Williams [*17] on the merits. We review decisions by state courts on the merits of a claim under section 2254(d). Section 2254(d) provides that:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Under normal circumstances, section 2254(d)(1) prohibits the issuance of the writ unless the state court decision conflicts squarely with Supreme Court precedent which is controlling as to law and fact, or if no such precedent exists, if "the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant supreme [*18] court precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts." *Green v. French, 143 F.3d 865, 870 (4th Cir. 1998)*, cert. denied, *142 L. Ed. 2d 698, 119 S. Ct. 844 (1999)*. Where, as here, "the state court decision fails to articulate any rationale for its adverse determination . . . [we] must independently ascertain whether the record reveals a violation of [petitioner's constitutional rights.]" *Cardwell, 152 F.3d at 339*. Nonetheless an overall obligation of deference to the state court system still obtains, and a state court's perfunctory decision both constitutes an adjudication on the merits, see *Wright v. Angelone, 151 F.3d 151, 156-57 (4th Cir. 1998)*, and must be upheld if it "is at least minimally consistent with the facts and circumstances of the case." *Weeks v. Angelone, 176 F.3d 249, 259 (4th Cir. 1999)* (internal quotation marks omitted). Here that standard of minimal consistency was more than met.

A.

Williams first claims that the prosecution suppressed an alleged informal plea agreement that the Commonwealth had with [*19] Cruse in violation of Brady . The Supreme Court of Virginia was correct, however, to reject Williams' claim. In state court the Commonwealth supplied two affidavits -- one from Woodson and one from Cruse's trial counsel, Donald Blessing -- stating unequivocally that Cruse had no agreement. Specifically, Woodson swore, "At the time Cruse testified against Williams in January of 1994, he had no plea agreement. Cruse testified truthfully that there was no plea agreement and that he remained charged with capital murder and subject to the death penalty." Similarly, Blessing stated, "Cruse testified truthfully at . . . trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence."

Moreover, before the district court, the Commonwealth introduced another affidavit from Blessing, in which he swore, "At the time Cruse testified against Williams in Cumberland County, he had no agreement or understanding, formal or informal, with the Commonwealth." The district court thus properly credited the state court's judgment, and there is no reason for federal courts to revisit the state court's [*20] determination in a federal hearing in view of the unrefuted evidence. See *Eaton v. Angelone, 139 F.3d 990, 995* (4th Cir.) (refusing to transform "a federal habeas proceeding into a second trial."), cert. denied, *141 L. Ed. 2d 709, 118 S. Ct. 2338 (1998); Spencer v. Murray, 18 F.3d 229 (4th Cir. 1994)* (upholding denial of habeas corpus on basis of trial counsel's affidavit); *Sawyers v. Collins, 986 F.2d 1493, 1504 (5th Cir. 1993)* (en banc) (upholding denial of habeas corpus without evidentiary hearing even when state court made factual determination solely on basis of affidavits).

Finally, even if Williams could demonstrate that Cruse had an informal plea agreement, he could not show materiality. See *Kyles v. Whitley, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)* (demonstration of a Brady claim requires a showing of materiality). Given Williams' own testimony that he was at least an accomplice in the rape of Mrs. Keller and that he shot Mr. Keller in the head, we are confident there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding [*21] would have been different." *Id. at 433-34* (quoting *United States v. Bagley, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)* (opinion of Blackmun, J.)). As a result, we agree that Williams failed to demonstrate a Brady violation.

B.

Williams next argues that the prosecutor violated his Sixth Amendment right to be present at trial and to confront adverse witnesses. See *Illinois v. Allen, 397 U.S. 337, 25 L. Ed. 2d 353, 90 S. Ct. 1057 (1970)* (Sixth Amendment right to be present at trial); *Pointer v. Texas,*

380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965) (Sixth Amendment right to confront prosecution's witnesses). Specifically, Williams charges that prosecutor Woodson impermissibly burdened those rights when, on cross-examination, he asked Williams, "You're the only witness who has sat in here through this trial and heard the testimony of every witness before you got to testify; isn't that correct?" n1 We need not decide whether allowing the prosecutor to proceed with this line of questioning was constitutional error because even if it were, the error was harmless. See *Sherman v. Smith, 89 F.3d 1134, 1137 (4th Cir. 1996)* **[*22]** (en banc) (noting that harmless error analysis applies to similar trial errors such as improper comment on defendant's silence at trial). Woodson's line of questioning was clearly aimed at impeaching Williams' testimony in the eyes of the jury.

n1 Indeed, the Supreme Court has recently granted certiorari on this very question. *Portuondo v. Agard, 143 L. Ed. 2d 346, 119 S. Ct. 1248 (1999).*

Such impeachment, however, would only have undermined Williams' exculpatory testimony, leaving unaffected his inculpatory testimony. And, as noted, Williams' inculpatory testimony was devastating. In such circumstances, it is clear that the error, if that it was, did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson, 507 U.S. 619, 637, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)* (internal quotation marks omitted).

Williams' claim is similarly unavailing under pre-AEDPA law. Whether or not we would determine independently that **[*23]** Woodson's question violated Williams' Sixth Amendment rights, it is clear that such a holding would create a new rule. See *Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989).* Williams points to *Griffin v. California, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965),* and *Brooks v. Tennessee, 406 U.S. 605, 32 L. Ed. 2d 358, 92 S. Ct. 1891 (1972),* to support his claim. In Griffin, the Supreme Court established that drawing a negative inference from the fact that a defendant has exercised his right to remain silent violates his Fifth Amendment rights. *380 U.S. at 613.* In Brooks, the Court held that requiring a defendant to testify first or not to testify at all also impermissibly burdened his Fifth Amendment right to remain silent. *406 U.S. at 613.* Neither decision held that it is constitutionally impermissible to impeach the defendant's testimony if he decides not to remain silent by commenting on his singular ability to hear the entirety of the preceding witnesses' testimony. Indeed, the Court in Brooks was careful to recognize the "risk of a defendant's coloring his testimony **[*24]** to conform to what has gone before" and to stress that "our adversary system reposes judgment of the credibility of all witnesses in the jury." *Id. at 611.* In short, we cannot hold that either Griffin or Brooks "dictates" a finding of constitutional error in circumstances such as these. *Stringer v. Black, 503 U.S. 222, 228, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992).*

The district court correctly denied Williams' requests for relief on these two claims.

IV.

A.

Williams next argues that the district court misinterpreted *21 U.S.C. § 848*(q)(9). Section 848(q)(9) governs the granting of expert assistance to indigent prisoners in connection with their federal habeas proceedings, providing that

> Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). No ex parte proceeding, communication, **[*25]** or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality . Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

Id. (emphasis added).

Williams contends that the district court erred in interpreting this section to require Williams to show a need for confidentiality in an adversary hearing. When the district court made that determination, Williams refused to participate in an adversary hearing, and the district court denied his request for expert assistance.

We agree with the district court. In limiting ex parte requests for expert assistance, Congress was clearly addressing the routine approval of such requests even in those instances where expert or investigative services were unnecessary. Section 848(q)(9) explicitly provides that there shall be no "ex parte . . . communication . . . pursuant to this section" without a showing of a need for confidentiality. Id. Allowing an ex parte hearing to determine the need for an ex parte hearing not only seems convoluted, but it also runs afoul of the plain language

[*26] of the statute. See *United States v. Gonzales, 150 F.3d 1246, 1264 (10th Cir. 1998)* (process is one that "is not to be held ex parte unless a proper showing is made concerning the need for confidentiality." (emphasis added) (internal quotation marks omitted)), cert. denied sub nom. *Albuquerque Journal v. Gonzales, 142 L. Ed. 2d 915, 119 S. Ct. 918 (1999); Patrick v. Johnson, 37 F. Supp. 2d 815, 816 (N.D. Tex. 1999)* ("Section 848(q)(9) clearly requires 'a proper showing . . . concerning the need for confidentiality' before the Court may consider any ex parte communication or request." (emphasis added) (quoting *21 U.S.C. § 848*(q)(9))).

The district court also rightly denied Williams' request for expert assistance. When Williams refused to proceed after the district court required him to demonstrate his need for confidentiality in an adversary hearing, he necessarily failed to show that expert services were "reasonably necessary." *21 U.S.C. § 848*(q)(9). n2

n2 We are unpersuaded by Williams' argument that our interpretation of section 848(q)(9) renders it unconstitutional. Williams' sole contention is that any reading of section 848(q)(9) that requires a petitioner to divulge confidential information impermissibly impinges on his right of access to the courts. See *Gardner v. California, 393 U.S. 367, 21 L. Ed. 2d 601, 89 S. Ct. 580 (1969)* (requiring that hearing transcripts that are made available to all be provided to indigent habeas petitioners to guarantee access to the courts). We do no more here than uphold the district court's determination that petitioner must demonstrate his need for confidentiality at a hearing. What information is disclosed at that hearing would of course remain within the discretion of the district court.

[*27]

B.

Finally, Williams argues that the district court erred by requiring him to file his federal habeas petition within 180 days of April 24, 1996 -- the AEDPA's enactment date -- pursuant to *21 U.S.C. § 2263*. Williams contends that section 2263 applies only to "opt-in" states -- those states that have met certain requirements pertaining to, inter alia, the appointment and compensation of counsel for postconviction relief proceedings. Because this circuit has not yet recognized Virginia as an "opt-in" state, Williams contends that applying section 2263 was error. Instead, Williams maintains, the district court should have granted him one year from the effective date of the AEDPA to develop his petition further. See *Brown v. Angelone, 150 F.3d 370, 375 (4th Cir. 1998)* (granting petitioners whose convictions became final in a non-opt-in state before the effective date of the AEDPA one year from the effective date to file their petitions).

Any error here was harmless. Williams' case remained in district court for a year and a half after he filed his petition. Yet Williams made not one motion to amend on the basis of claims developed during **[*28]** the petition's pendency. Furthermore, although Williams requests a remand for an additional five months in which to amend his petition now, he provides no additional claims he might like to add. In all events, Williams cannot demonstrate that the district court's error prejudiced him.

V.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

FILED
JUN - 3 1998
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS, Petitioner,	)	Civil Action No. 3:96CV529
v.	)	
J.D. NETHERLAND, WARDEN, Respondent.	)	

ORDER

Upon due consideration, for the reasons stated in the Memorandum this day filed, and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED that:

(1) The Court's Order, dated April 13, 1998, granting an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5) is VACATED;

(2) Petitioner's federal habeas petition is DISMISSED in its entirety;

(3) Respondent's Motion For Summary Judgment is DENIED AS MOOT;

(4) At the expiration of thirty (30) days, unless an appeal has been filed, let the Clerk return to the appropriate repository such records as the Court has received in reference to this cause;

(5) This action is dismissed with prejudice; and

(6) All remaining motions not previously ruled on by the Court are DENIED AS MOOT.

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Let the Clerk send a copy of this Order and the accompanying Memorandum to all counsel of record.

/s/ Robert E. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

DATE: June 3, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILE
JUN - 3 1998
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

MICHAEL WAYNE WILLIAMS, Petitioner,	)	Civil Action No. 3:96CV529
v.	)	
J.D. NETHERLAND, WARDEN, Respondent.	)	

MEMORANDUM

This matter is before the Court on remand from the United States Court of Appeals for the Fourth Circuit. For the reasons which follow, the Court concludes that Petitioner Michael Wayne Williams ("Williams") is not entitled to an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5). Accordingly, the Court will VACATE its Order granting Williams an evidentiary hearing on these claims, and DISMISS Williams' federal habeas petition in its entirety.

I.

On April 13, 1998, this Court dismissed the majority of Williams' federal habeas claims, but granted an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5). Respondent J.D. Netherland, Warden of Mecklenberg Prison ("Respondent"), subsequently moved for summary judgment, arguing that this Court

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misapplied applicable federal law. The Court heard argument on the motion and took the matter under advisement. Respondent then moved the Court for a stay of its Order requiring the evidentiary hearing, pending resolution by the Fourth Circuit of an Application For Emergency Stay and a Petition For A Writ Of Mandamus And Prohibition which Respondent filed the next day. On May 27, 1998, the Fourth Circuit granted Respondent's Application For An Emergency Stay and remanded the matter for further proceedings.[1]

II.

A. Applicability of 42 U.S.C. § 2254(e)(2)

In remanding the matter, the Fourth Circuit directed this Court to apply the requirements of 28 U.S.C. § 2254(e)(2) in evaluating whether Williams is entitled to an evidentiary hearing on his claims. See CA4 Stay Order (May 27, 1998) at 2. A section 2254 petition is ordinarily limited to the factual record developed in state court proceedings, as the amended section 2254(e)(2) limits a petitioner's ability to present evidence in a federal habeas proceeding that was not considered by the state

[1] The Fourth Circuit withheld ruling on Respondent's Petition For A Writ Of Mandamus And Prohibition until this Court reevaluated Williams' entitlement to an evidentiary hearing under the Antiterrorism and Effective Death Penalty Act ("AEDPA").

court.

Specifically, section 2254(e)(2), as amended, provides that a petitioner may not present evidence in a federal habeas proceeding that was not considered by the state court if the petitioner "failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). In addition, a petitioner is only entitled to an evidentiary hearing if:

> (A) the claim relies on --
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

While the Fourth Circuit has not yet addressed the applicability or meaning of section 2254(e)(2), Judge Ellis has carefully considered the proper interpretation of this section and concluded the following:

> [A]n applicant "fails" when he does not take or seek the opportunity to develop evidence in a state court proceeding. This is where (e)(2)

> applies. And this is where (e)(2)(A) may forgive the failure if new facts or a retroactive change in constitutional law form the basis of a claim. In contrast, an applicant does not "fail" where he seeks, but is denied, the opportunity to develop facts in state court. In this event, the rigorous standard of § 2254(e)(2) will not apply.

Cardwell v. Netherland, 971 F. Supp. 997, 1011 (E.D. Va. 1997). Thus, a petitioner's "failure" to develop the factual basis of a claim in state court proceedings must be attributable to some sort of fault on the part of the petitioner--i.e. something the petitioner did or omitted to do.

Other district and circuit courts have reached similar conclusions. See, e.g., Jones v. Woods, 114 F.3d 1002, 1013 (9th Cir. 1997) ("Where, as here, the state courts simply fail to conduct an evidentiary hearing, the AEDPA does not preclude a federal evidentiary hearing on otherwise exhausted habeas claims."); Burris v. Parke, 116 F.3d 256, 258-59 (7th Cir. 1997) ("To be attributable to a 'failure' under federal law the deficiency in the record must reflect something the petitioner did or omitted."); Hunter v. Vasquez, 1996 WL 612484, *6 (N.D. Cal. 1996) (holding that where the state court denies petitioner's requests for discovery, investigatory funds, and a hearing, "the Court cannot find that Petitioner failed adequately to develop the facts of his claims in state court.").

Moreover, the United States Supreme Court's recent decision in Breard v. Greene, 118 S. Ct. ___, 1998 U.S. LEXIS 2465 (April 14, 1988), does not compel a different conclusion. In Breard, the Supreme Court simply reiterated what the plain language of section 2254(e)(2) and the previously cited cases reveal--that the limitation on evidentiary hearings in federal habeas proceedings applies only when the petitioner fails to develop the factual basis of a claim in state court proceedings. See id. at *3. Contrary to Respondent's tortured interpretation of the relevant language, the Supreme Court did not hold that the word "fail" in section 2254(e)(2) be given a strict liability reading. As the Seventh Circuit has noted, if such was the case, "then a state could insulate its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts. Nothing in sec. 2254(e) or the rest of the AEDPA implies that states may manipulate things in this manner." Burris v. Parke, 116 F.3d 256, 258-59 (7th Cir. 1997).

Thus, the plain meaning of section 2254(e)(2) prohibits a federal evidentiary hearing only in those cases where a petitioner has been afforded an opportunity to develop evidence in state habeas court, but has failed to do so. See 28 U.S.C. § 2254(e)(2); Cardwell v. Netherland, 971 F. Supp. 997, 1011 (E.D.

Va. 1997). Only under such circumstances is this Court precluded from considering new facts presented for the first time in federal habeas proceedings or granting an evidentiary hearing for the consideration of same.

In Petitioner's case, it is clear that he did not "fail[] to develop" the factual basis of his claims. The record is replete with examples of state habeas counsel's numerous attempts to obtain the evidence required to discover, present, and prove Williams' claims--including informal attempts to resolve discovery matters between counsel which were repeatedly rebuffed. The state courts further denied Williams the opportunity to develop the necessary facts by denying all of Williams' requests for discovery, expert assistance, and investigative funds, and by refusing to hold any hearing to take evidence outside of the trial record. Under such circumstances, the Court is hard-pressed to find that Williams "failed to develop the factual basis of a claim in State Court proceedings," thereby triggering application of section 2254(e)(2).

Despite its concerns over the applicability of section 2254(e)(2) to cases such as the present one, however, this Court has been directed by its Court of Appeals to apply section 2254(e)(2) to Williams' case. Under that stringent standard,

which is now the law of this case, the Court concludes that Williams is not entitled to an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5).

B. Analysis

As discussed above, unless Williams can satisfy both subsection (A) and subsection (B) of 28 U.S.C. § 2254(e)(2), this Court must deny him an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5). Based on the present record, the Court agrees with Respondent's argument that "regardless of whether petitioner can satisfy § 2254(e)(2)(A), he cannot possibly satisfy the stringent requirements of § 2254(e)(2)(B)." Resp't Resp. to CA4 Stay Order at 4.

Subsection (B) of 28 U.S.C. § 2254(e)(2) requires a showing by "clear and convincing evidence that but for [the alleged] constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). In the instant case, Williams was convicted of capital murder on evidence, including his own testimony, which demonstrated that he was a participant in the armed robbery of Mr. and Mrs. Keller, that he was at minimum an accomplice in the rape of Mrs. Keller, and that he fired the first shot into Mr. Keller's head. According to the medical evidence presented at

trial, any of the three gunshot wounds to Mr. Keller's head could have been potentially lethal and all three definitely contributed to his death. See Tr. 1-4-94 at 252-56, 262-64. Based on this evidence alone, Williams cannot demonstrate by "clear and convincing evidence" that no reasonable juror would have found him guilty of the capital murder of Mr. Keller.

Moreover, there is no "but for" nexus between Claims I(A), IV(A)(1), or IV(A)(5) and the "innocence" requirement of subsection (B). As noted by Respondent, Claims I(A) and IV(A)(5) which involve a juror's allegedly untruthful answers during voir dire do not have any bearing on the evidence presented at trial of Williams' guilt in the shooting death of Mr. Keller. Furthermore, even assuming arguendo that some sort of informal understanding did exist between Williams' co-defendant, Cruse, and the Commonwealth prior to Cruse's testimony at Williams' trial [Claim IV(A)(1)], Williams' own testimony established that he shot Mr. Keller during the commission of a robbery and subsequent to the rape of Mrs. Keller and that therefore, he is guilty of capital murder. Thus, even if the jury chose to believe Williams' version of the shootings over Cruse's testimony, Williams himself admitted under oath to firing the first shot into Mr. Keller's head--a shot which the medical

examiner testified as being potentially lethal.

In light of the foregoing, the Court finds that Williams cannot make the requisite showing of "innocence" under 28 U.S.C. § 2254(e)(2) and thus, he is not entitled to an evidentiary hearing on his remaining claims. Accordingly, the Court will VACATE its Order granting an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5), and DISMISS Williams' federal habeas petition in its entirety.

An appropriate Order shall issue.

UNITED STATES DISTRICT JUDGE

DATE: June 3, 1998

FILED: May 27, 1998

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-17
(CA-96-529-3)

In Re: FRED W. GREENE, Warden,
Mecklenburg Correctional Center,

Petitioner,

O R D E R

On November 20, 1996, Michael Wayne Williams filed a petition for a writ of habeas corpus in federal court in the Eastern District of Virginia. On April 13, 1998, the district court dismissed most of Williams' claims but granted him an evidentiary hearing on three claims. That evidentiary hearing is scheduled to occur on June 2, 1998. The Commonwealth now seeks to prevent the district court from holding the evidentiary hearing by filing an application for an emergency stay and a petition for a writ of mandamus and prohibition with this court.

Both parties agree that Chapter 153 of the Antiterrorism and Effective Death Penalty Act (AEDPA) governs Williams' petition.

AEDPA establishes certain limits on a court's ability to conduct an evidentiary hearing where an applicant has failed to develop the factual basis of a claim in state court. In such cases, the court may hold an evidentiary hearing only if the claim satisfies two requirements. First, the claim must rely on either certain retroactive new rules of constitutional law or "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A). Second, the underlying facts must "be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Id. § 2254(e)(2)(B).

In granting the evidentiary hearing, the district court did not apply these requirements. Instead, it simply cited several pre-AEDPA cases to support its conclusion that defendant has demonstrated cause and prejudice. This, we believe, was error.

Accordingly, the warden's application for an emergency stay is granted and the matter is remanded for further proceedings. On remand, the district court must determine whether, under AEDPA, Williams is entitled to an evidentiary hearing on these claims. Until the district court has evaluated Williams' entitlement to an evidentiary hearing under the strict requirements of AEDPA, we believe it would be premature to act on any petition for a writ of

mandamus and prohibition.

The warden's application for an emergency stay is granted and the matter remanded for further proceedings as set forth herein.

Entered at the direction of Chief Judge Wilkinson, with the concurrence of Judge Williams. Judge Hamilton voted to deny the application and petition.

For the Court

/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
APR 13 1998
Clerk, U.S. District Court
Richmond, Va

MICHAEL WAYNE WILLIAMS, Petitioner,	)	
v.	)	Civil Action No. 3:96CV529
J.D. NETHERLAND, WARDEN, Respondent.	)	

ORDER

For the reasons stated in the Memorandum of the Court this day filed and deeming it proper so to do, it is ADJUDGED AND ORDERED that all claims asserted in the Petition, except Claims I(A), IV(A)(1), and IV(A)(5) be and the same are hereby DISMISSED.

An evidentiary hearing on Claims I(A), IV(A)(1) and IV(A)(5) will be conducted commencing at 8:30 a.m. Monday, May 18, 1998.

Counsel for each of the parties herein shall, by 1:00 p.m., May 13, 1998, file with the Clerk of this Court proposed findings of fact and conclusions of law.

Let the Clerk send copies of the Memorandum and this Order to all counsel of record.

/s/
UNITED STATES DISTRICT JUDGE

Date APR 13 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
APR 13 1998

MICHAEL WAYNE WILLIAMS, Petitioner,	)	
v.	)	Civil Action No. 3:96CV529
J.D. NETHERLAND, WARDEN, Respondent.	)	

MEMORANDUM OPINION

This matter is before the Court on the motion of Respondent J.D. Netherland, Warden of Mecklenberg Prison, to dismiss Petitioner Michael Wayne Williams' petition for a writ of habeas corpus for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The matter has been fully briefed by the parties and is ripe for decision. For the reasons which follow, the Court will GRANT IN PART AND DENY IN PART the motion.

I. FACTUAL BACKGROUND

In affirming Williams' conviction and sentence on direct appeal, the Virginia Supreme Court stated the facts of the case as follows:

> Between 9:30 and 10:30 p.m., on Saturday, February 27, 1993, Verena Lozano James drove Williams and Cruse to a rural area in Cumberland County and left them approximately one-half mile from Bear Creek Market. Williams and Cruse planned to

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rob persons in the market with a .357 caliber Ruger Black Hawk revolver that Williams had given to Cruse.

The two men walked to the store, but found it closed. Williams suggested that "he knew a house where we can go; they'd have a couple thousand dollars." Cruse agreed, and they walked some distance to the Kellers' house. Upon arrival at the Kellers' house, Cruse returned the Black Hawk revolver to Williams and Cruse knocked on the door. When Mr. Keller opened the door, Williams pointed the gun at him and both men entered the house.

Williams ordered the Kellers to remove all their clothes, and he remained in the kitchen with them while Cruse began searching the house for money and other valuables. After Cruse found a fully loaded .38 caliber handgun, Williams decided "to tie [the Kellers] up," and Cruse did so. The Kellers were then placed, first in one closet and later in separate closets, and both men resumed their search.

After the two men had assembled some of the Kellers' property in the living room, at Williams's suggestion, first Williams, then Cruse, raped Mrs. Keller. Afterward, Williams ordered both Kellers to take showers and put on clean clothes, which they did. Williams then directed the Kellers to "take a walk" with them. Upon hearing that the two men planned to burn the house, Mrs. Keller took the Kellers' marriage certificate with her. As the Kellers, Williams, and Cruse left the house and walked "[d]own on a dirt road and into a thicket," Williams was carrying the .38 caliber handgun and Cruse was carrying the Black Hawk revolver.

When they were in the thicket with Williams standing behind Mr. Keller and Cruse standing behind Mrs. Keller, Williams said, "We'll shoot at the count of three." Upon Williams's count of three, he shot Mr. Keller with the .38 caliber handgun and Mr. Keller fell to the ground. However, Cruse did not shoot Mrs. Keller. Williams told Cruse to shoot Mrs. Keller because "he didn't want to leave no witnesses." Cruse then shot Mrs. Keller once with the Black Hawk revolver. After Mrs. Keller fell, Mr. Keller stood up and Williams shot him again with the .38 caliber handgun. As Cruse started to walk away, Williams said, "Wait ... [w]hat if they ain't dead?", and he shot each of the Kellers "a couple more times apiece" with the .38 caliber handgun.

The two men returned to the house, where they loaded a television set, microwave oven, shotgun, stereo set, and

speakers into Mr. Keller's jeep, and, at Williams's suggestion, set fire to the house. Williams and Cruse then took the jeep to Fredericksburg, where they sold some of the stolen property the next day. They then threw the remaining stolen property and the Black Hawk revolver into the Rappahannock River and set fire to the jeep.

Upon hearing of the Keller fire on Monday morning, Verena James advised the police that she had taken Williams and Cruse to an area not far from the Keller house on the night of the fire. Consequently, the police sought to question the two men regarding the fire. Williams and Cruse had returned to Cumberland County the Monday following the murders and the police were able to question Cruse. Williams, however, fled to Florida.

At first, Cruse furnished no information of value to the police. However, after the police discovered the bodies of the Kellers on Tuesday, Cruse consulted counsel. His counsel obtained a conditional agreement from the Commonwealth that it would not seek the death penalty provided Cruse gave a truthful statement of his knowledge of the crimes. Cruse then furnished information that implicated both men in all of the crimes charged, except for Cruse's role in Mrs. Keller's rape. Because Cruse breached his agreement in failing to tell the police that he had raped Mrs. Keller, the Commonwealth also indicted him for the Kellers' capital murders.

Testifying in his own defense, Williams agreed with Cruse: (1) that Williams was the one who suggested robbing persons at the store; (2) that Williams was the first one to shoot Mr. Keller and that Cruse was the first one to shoot Mrs. Keller; and (3) that it was Williams's idea to burn the Keller house. However, Williams (1) denied that he raped Mrs. Keller, (2) claimed that Cruse fired all the subsequent shots into the Kellers' bodies, and (3) contradicted other details of Cruse's testimony about who had suggested some of their activities during and after the murders.

Lisa C. Schiermeier, a serologist, tested the seminal fluid recovered from Mrs. Keller's vagina as a part of the Physical Evidence Recovery Kit prepared by Dr. Deborah Kay, an assistant chief medical examiner who performed the autopsy on Mrs. Keller. Schiermeier compared that sample with the blood types of Cruse, Williams, and Mr. Keller. Schiermeier testified that her comparison indicated only Williams could have contributed a certain type of seminal fluid found in the

sample. Dr. George C. Li, a DNA expert who performed a DNA test on the spermatozoa from the sample, testified that his test results were consistent with a conclusion that Cruse and Williams jointly contributed the seminal fluid.

Williams v. Commonwealth, 248 Va. 528, 533-35 (Va. 1994).

II. PROCEDURAL HISTORY

On June 29, 1993, in the Circuit Court of Cumberland County, Virginia, Michael Wayne Williams ("Williams") was charged in twelve separate indictments for the capital murder, robbery, rape, and abduction of Mary Keller; for the capital murder, robbery, and abduction of Morris Keller; for capital murder based on two related homicides; for statutory burglary; and for arson. Jeffrey Allan Cruse ("Cruse") was also indicted for the same offenses. Several months earlier, Williams was arrested and indicted on four homicides which had occurred in Prince Edward County on December 24, 1992. Williams pled not guilty to each of the charges.

Williams was subsequently tried by a jury which found him guilty on all counts. On the non-capital charges, the jury fixed Williams' punishment at life imprisonment for the rape, 50 years and a $100,000 fine for the arson, 40 years for each of the robberies, 20 years for the burglary, and 10 years for each of the abductions. On January 7, 1994, the jury recommended that

Williams be sentenced to death for the capital murders of both Mr. and Mrs. Keller, finding that both statutory aggravators of "future dangerousness" and "vileness" existed. The trial judge subsequently adopted the jury's recommendation and sentenced Williams to death on February 22, 1994.

On November 4, 1994, the Virginia Supreme Court upheld Williams' capital murder convictions and death sentences in Williams v. Commonwealth, 248 Va. 528 (1994). Williams' request for a rehearing was denied on January 13, 1995. On June 26, 1995, the U.S. Supreme Court denied his petition for a writ of certiorari. See Williams v. Virginia, 113 S. Ct. 1880 (1995). Williams subsequently filed a petition for a writ of habeas corpus in state post-conviction proceedings.

On August 30, 1995, Williams filed his initial state habeas petition. From December 1995 to January 1996, counsel for Williams also filed motions for expert assistance and discovery. On January 29, 1996, after receiving leave to amend, Williams filed an amended state habeas petition. The Virginia Supreme Court dismissed Williams' petition without hearing or oral argument and denied all motions for expert services and discovery on March 18, 1996. The U.S. Supreme Court again denied certiorari on October 7, 1996. See Williams v. Netherland, 117

S. Ct. 200 (1996).

On July 2, 1996, this Court granted Williams' motion for appointment of counsel and stay of execution, then scheduled for July 11, 1996. By Order entered on August 13, 1996, this Court directed Williams to file his federal habeas petition within 180 days of April 24, 1996. The Court subsequently granted Williams' request for a 30-day extension. Williams filed his federal habeas petition on November 20, 1996.

III. CLAIMS PRESENTED

In his federal habeas petition Williams attacks his conviction and sentence on the following grounds:

I. Juror Misconduct Violated Williams' Rights to an Impartial Jury and to Due Process of Law

   A. Juror Stinnett

   B. Juror Blanton

   C. The Jurors Improperly Considered Parole Eligibility During the Sentencing Deliberations

II. The Evidence Was Insufficient as a Matter of Law to Sustain Any Convictions for Capital Murder

   A. The Evidence Did Not Establish that Williams Was the Triggerman

   B. The Predicate Felonies Were Not Part of the Murders

III. The Trial Court Denied Williams a Fair Trial and Sentencing

   A. Guilt Phase

      1. The Trial Court Gave an Erroneous Instruction on Capital Murder and Relieved the Commonwealth of Its Burden to Prove the Elements of Capital Murder

      2. The Trial Court Did Not Properly Perform or Permit a "Life-Qualification" of the Jury

         a. Jurors Trent and Holman

         b. Juror Bernard

         c. Juror Davis

         d. Jury Predisposed to Impose Death

      3. The Trial Court Erred When It Refused to Permit In-Depth, Individual Questioning Regarding Pre-Trial Publicity

      4. The Trial Court Denied Williams a Fair Trial By Refusing His Request For Appointment of an Investigator

      5. A Mistrial Should Have Been Declared After Verena James Referred to the "Rice Fires" During the Guilt Phase of Trial

      6. The Trial Court Erred in Allowing the Commonwealth's Attorney to Improperly Bolster the Testimony of Cruse

      7. The Trial Court Erred in Admitting Into Evidence Numerous Photographs of the Victims

      8. Williams' Constitutional Right to be Present at Trial and to Confront His Witnesses Should Not Have Been the Subject of Impeachmen

B. Sentencing Phase

1. The Trial Court Erred in Not Declaring a Mistrial or Not Giving Cautionary Instructions After Improper and Inflammatory Closing Argument by the Commonwealth at the Sentencing Phase

2. Williams Was Not Provided With Appropriate Discovery to Rebut the Commonwealth's Case on Vileness and Future Dangerousness

3. The Court Erred in Denying a Jury Instruction Concerning the Meaning Life Sentence and Williams' Mandatory 30 Year Parole Ineligibility

4. The Trial Court Erred in Permitting the Mother of the Victim to Testify at the Sentencing Phase

5. The Trial Court Erred When Admitting Evidence of Unadjudicated Criminal Acts in the Sentencing Phase of the Trial

6. The Trial Court Erred in Admitting Evidence of Unadjudicated Criminal Conduct Without Setting a Standard of Proof

7. The Trial Court Erred in Admitting Photographs of the Prince Edward Homicides

8. The Trial Court Erred in Permitting Cross-Examination of Williams' Mother That Exceeded the Scope of Direct Examination

9. The Trial Court Erred in Restricting the Testimony of Williams' Mitigation Expert and Barring Testimony Explicitly Permitted Under the Statute

10. The Trial Court Erred With Instructing the Jury at the Sentencing Phase and in Failing

to Instruct on Mitigation and Mitigating Evidence

11. The Trial Court's Sentencing Instructions Were Constitutionally Deficient

IV. Prosecutorial Misconduct Deprived Williams of a Fair Trial and Due Process

A. Guilt Phase

1. The Commonwealth Failed to Disclose Its Agreement With the Chief Prosecution Witness, Cruse, and Actively Misled the Jury Regarding An Agreement With Cruse

2. The Commonwealth Failed to Disclose a Psychiatric Evaluation of Cruse Containing Brady Information

3. The Commonwealth Allowed Cruse, Williams' Co-Defendant, to Misrepresent his Cooperation and Contacts With the Commonwealth Prior to Williams' Trial

4. The Commonwealth Presented Improper Opening and Closing Arguments

5. The Commonwealth Failed to Reveal at Voir Dire That Stinnett's Former Husband Would be a Trial Witness and That She Had Failed To Reveal Their Relationship to the Court and Counsel

B. Sentencing Phase

1. The Prosecutor Acting Improperly When Objecting to Dr. Cornell's Testimony About Mitigation Factors Properly Before the Jury

2. The Prosecutor Engaged in Improper and Prejudicial Argument During the Sentencing Phase

V. Williams Did Not Receive Effective Assistance of Counsel

A. Guilt Phase

1. Counsel was Ineffective in Failing to Object to Improper Instructions Regarding the Triggerman Rule and the Degrees of Murder

2. Counsel Did Not Effectively Investigate or Confront the Petitioner's Co-Defendant, Jeffrey Alan Cruse, or the Issue of Cruse's Plea Agreement With the Commonwealth

3. Trial Counsel Failed to Investigate, Develop and Present Evidence of Voluntary Intoxication as a Defense and to Impeach the Prosecution's Key Witness

   a. Intoxication as a Defense

   b. Intoxication to Impeach the Prosecution's Key Witness

4. Counsel was Ineffective in Failing to Object to the Court's Deficient Preliminary Instruction and Jury Charge on the Burden of Proof

5. Petitioner's Counsel Were Ineffective on Voir Dire and Compounded The Trial Court's Error

   a. Counsel Failed to Adequately Protect Williams' Right to Life Qualification Questions

      i. Juror Trent

      ii. Juror Holman

      iii. Juror Bernard

   b. Counsel Failed to Challenge Prospective Juror Stinnett for Cause

   c. Counsel Failed to Conduct Extensive Voir Dire on the Issue of Pretrial Publicity

6. Trial Counsel Were Ineffective in Seeking Court Appointment of an Investigator

7. Counsel was Ineffective in Failing to Promptly Stipulate to the Testimony of Family Members Regarding Identification and Ownership of Property Stolen From the Victims

8. Counsel Failed to Protect Williams' Rights When Counsel Failed to Offer When a Single Objection to Improper Prosecutorial Comments

9. Counsel was Ineffective in Failing to Object to Numerous Improper and Misleading Statements by the Commonwealth in Opening and Closing Arguments During the Guilt/Innocence Phase of the Trial

B. Sentencing Phase

1. Counsel Failed to Object to Testimony From the Victim's Mother

2. Counsel Failed to Make a Timely Objection to Photographs of the Prince Edward Victims and to Properly Argue the Objection

3. Counsel Failed to Develop Defense Evidence and Mitigation Evidence Through the Medical Examiner

4. Counsel Failed to Develop Defense Evidence and Mitigation Through Williams' Brother

5. Counsel Failed to Object to Cross Examination on Williams' Arrest at the Penalty Phase

6. Counsel Failed to Present Evidence of Intoxication and Drug Use

7. Counsel Failed to Protect the Testimony of Their Expert Witness During Objections and Interruptions by the Prosecutor and Court

8. Counsel Failed to Request an Evaluation by a Neuropsychologist

9. Counsel Failed to Present Williams' Testimony at the Sentencing Phase

10. Counsel Failed to Object to a Deficient Instruction on Mitigation and Failed to Request a Corrective Mitigation Instruction

11. Counsel Failed to Object to Improper, Inflammatory and Prejudicial Argument and Failed to Request a Curative Instruction

12. Counsel Present Ineffective Argument at the Penalty Phase

C. Ineffective Assistance on Appeal

1. Failure to Appeal Denied Jury Instructions

2. Counsel Failed to Properly Appeal the Trial Court's Erroneous Restriction of Voir Dire and Violations of Witherspoon-Witt

3. Counsel Failed to Appeal the Trial Court's Failure to Remove Gary Davis in the Same Manner as the Removal Was Objected to at the Trial Court Level

VI. Williams Was Not Provided With the Effective Assistance of a Mental Health Expert Guaranteed Under Ake v. Oklahoma, 470 U.S. 68 (1985)

VII. Additional Constitutional Errors

A. Virginia's Death Penalty Statutes Are Unconstitutional as They Fail to Provide Guidance on the Meaning and Use of Mitigating Evidence

B. Virginia's Death Penalty Statutes Are Unconstitutionally Vague as They Fail to Provide the Sentencer With Sufficient Guidance to Assure that the Death Penalty is Not Imposed in an Arbitrary and Capricious Manner

C. Virginia's "Vileness" Factor, as Applied, Unconstitutionally Denies Defendant Notice and Meaningful Opportunity to be Heard

D. The "Future Dangerousness" Aggravating Factor is Unconstitutionally Vague and Inherently Misleading as it Asks Jurors to Find a Probability Beyond a Reasonable Doubt

E. Section 19.2-264.4(c), Which Allows The Sentencer to Find "Future Dangerousness" Based on Unadjudicated Criminal Conduct, Violates The Sixth, Eighth and Fourteenth Amendments

F. The "Future Dangerousness" Aggravating Factor is Inherently Unreliable and is Insufficient to Guide Jury Discretion

G. Imposition of the Death Penalty in Virginia is Arbitrary Because of the Failure of the Supreme Court of Virginia to Engage in Meaningful or Fair Appellate Review

H. Virginia's Contemporaneous Objection Rule is Unconstitutional as Applied

I. Imposition of the Death Penalty Violates the Eighth and Fourteenth Amendments Since it Constitutes Cruel and Unusual Punishment

IV. THE APPLICABILITY OF THE 1996 ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

On April 24, 1996, before Williams filed his federal habeas petition, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (the "Act"), became effective. Title I of the Act, entitled "Habeas Corpus Reform," substantially alters the substantive law governing habeas corpus petitions. Sections 101 to 106 of the Act modify pre-existing habeas corpus procedures contained in Chapter 153 of the Judicial Code, 28 U.S.C. §§ 2241-2255. Section 107(a) of the Act enacts a new Chapter 154, 28 U.S.C. §§ 2261-2266, which applies to habeas petitions in capital cases.

This Court has previously held that the new Act did not apply because Virginia had not satisfied the "opt-in" requirements of § 107(a) and applying Chapter 153 violated retroactivity principles. See Strickler v. Netherland No. 3:95cv924 (E.D. Va. 1996); Saunders v. Angelone, No.3:95cv620 (E.D. Va. 1996). Respondent urges the Court to reconsider its prior ruling, arguing that the procedural posture of Williams' case differs significantly from that of Strickler and Saunders. In both those cases, petitioners filed their federal habeas petitions before the Act was enacted, and had entered state

habeas proceedings before the Virginia General Assembly passed their July 1995 amendments. Williams, however, filed his state habeas petition after July 1995 and then filed his federal habeas petition in November 1996--seven months after the Act's enactment. The legal landscape governing Williams' petition has clearly changed since Strickler and Saunders.

A. Chapter 154: New Habeas Corpus Provisions

Section 107(a) of the Act, codified at Chapter 154, 28 U.S.C. §§ 2261-2266, essentially offers a system of expedited review and other "benefits" to states that qualify under either of two "opt-in" procedures: (1) the "post-conviction" procedure provided by 28 U.S.C. § 2261; or (2) the "unitary review" procedure provided by 28 U.S.C. § 2265. As this Court found in Strickler, the Fourth Circuit requires courts to analyze federal habeas petitions under § 107 of the Act because that section specifically states that the Act "shall apply to cases pending on or after the date of enactment of this Act." § 107(c); see Bennett v. Angelone, 92 F.3d 1336, 1342 (4th Cir. 1996), cert. denied, 117 S. Ct. 503 (1996). Section 107 applies, however, only if Virginia satisfies the "opt-in" requirements. Since Virginia does not have a unitary review procedure, the Court must therefore analyze whether Virginia meets the post-conviction

review procedures and thus, qualifies as an opt-in state.

1. The "Opt-In" Requirements

To qualify as an opt-in state, a state must meet all four of the following criteria:

(1) The State must establish by statute, rule of its court of last resort, or other agency authorized by state law, a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent capital defendants. See § 2261(b).

(2) Such mechanism must provide standards of competency for the appointment of such counsel. See § 2261(b).

(3) Such mechanism must affirmatively offer counsel to all state prisoners under capital sentence. See § 2261(c).

(4) Such mechanism must provide for an entry of a court order either appointing counsel to each capital defendant, or explaining that such an appointment was not made on the basis that a defendant was not indigent or rejected the offer of counsel with an understanding of the legal consequences. See § 2261(c).

2. Has Virginia Satisfied the Opt-In Requirements?

Since July 1, 1992, Virginia has required the appointment of counsel for post-conviction capital cases under Va. Code § 19.2-163.7. While the Fourth Circuit has not considered whether this appointment mechanism satisfies the requirements of Chapter 154, this Court finds that the automatic appointment of counsel for indigent defendants does meet the first opt-in criterion.

Virginia, however, still fails to reap the benefits of

Chapter 154 because it has not provided a mechanism for the compensation and payment of such counsel as required by the Act. While Virginia substantially complies with the law via the appropriations acts of the General Assembly that provide for the payment of such counsel, it has not specifically established a "mechanism" for payment as required by the Act. The Fourth Circuit recently noted that "the Virginia statutes and regulations do not specifically provide for the compensation or payment of litigation expenses of appointed counsel, as § 107 requires." Bennett v. Angelone, 92 F.3d 1336, 1342 n.2 (4th Cir. 1996), cert. denied, 117 S. Ct. 503 (1996). This same conclusion was reached by the Court in Satcher v. Netherland, 944 F. Supp. 1222 (E.D. Va. 1996), aff'd in part and rev'd in part on other grounds, 126 F.3d 561 (4th Cir. 1997).

As the Court in Satcher noted, "[i]f Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance based on past performance, it could have done so." Id. at 1242. Congress instead chose to confer such benefits to those states that have made a formal commitment to providing a post-conviction review system which would protect capital litigants' constitutional rights. Id. This Court agrees with this analysis

and finds that Virginia's system for compensation and payment of expenses still fails to meet the standards established by § 107.[1] Thus, Virginia does not qualify as an opt-in state because it fails to adhere to the formal requirements of § 2261. Accordingly, Chapter 154 does not apply to Williams' federal habeas petition.

B. Chapter 153 Amendments

Chapter 153 of the Act, §§ 101-106, effects a number of procedural changes to previous habeas corpus statutes codified in Chapter 153. Of particular relevance to Williams' petition is § 104 which substantively changes the standards of review under 28 U.S.C. § 2254.[2] Furthermore, unlike Chapter 154, the Chapter 153 amendments are not made explicitly applicable to petitions pending when the Act took effect. The U.S. Supreme Court in Lindh v. Murphy, 117 S. Ct. 2059 (1997), recently held that the

[1] The Court is aware that the amended Va. Code § 19.2-163, effective July 1998, does provide for such a compensation and payment mechanism. This amendment, however, was not in effect at the time Williams filed his federal habeas petition.

[2] Specifically, § 104 limits the grounds on which petitions may be granted (28 U.S.C. § 2254(d)), requires greater deference to state court findings of fact (28 U.S.C. § 2254(e)(1)), limits the availability of evidentiary hearings in a habeas court (28 U.S.C. § 2254(e)(2)), and eliminates ineffectiveness or incompetence of post-conviction counsel as a ground for relief under 28 U.S.C. § 2254 (28 U.S.C. § 2254(i)).

amendments do not apply to habeas corpus cases that were pending when the Act took effect, thereby resolving a split among the circuits. Applying the amendments to these pending cases, the U.S. Supreme Court held, violates principles against retroactive application of laws. See Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994). The U.S. Supreme Court expressly found that "the amendments to chapter 153 [apply] only to such cases as were filed after the statute's enactment." Lindh, 117 S. Ct. at 2062.

Williams attempts to place his federal habeas petition in this "pending" box by arguing that he filed a state habeas petition before the Act's enactment and therefore, applying the amendments to his federal habeas petition would trigger Landgraf's retroactive effect. Indeed, if his federal habeas petition were pending when the Act took effect, this Court could not apply the Chapter 153 amendments pursuant to Lindh. Williams, however, filed his federal habeas petition in November 1996. His strained argument--that the amendments would have an impermissible retroactive effect on his federal habeas petition merely because he went through state post-conviction proceedings with the assumption that he would enter federal review under the old 28 U.S.C. § 2254--is contrary to the U.S. Supreme Court's directive in Lindh. Therefore, the Chapter 153 amendments

enacted seven months before Williams filed his federal habeas petition will govern his claim.

V. EXHAUSTION AND PROCEDURAL DEFAULT

This Court's review of Williams' federal habeas petition is restricted to an inquiry of whether his confinement and sentence are in violation of federal constitutional or statutory law. See 28 U.S.C. § 2241(c)(3). Before this Court can reach the merits of any claim, however, Williams must demonstrate that he has exhausted all state court remedies. See Rose v. Lundy, 455 U.S. 509 (1982). This requirement is strictly enforced in the interest of giving the state courts the first opportunity to consider any alleged errors. See id.

A state court has not been given a full opportunity to rule on a claim unless it has been presented before the state's highest court. See Brown v. Allen, 344 U.S. 443 (1953). In presenting a claim to the state court, the petitioner must "fairly present" claims cognizable under federal law. See Picard v. Connor, 404 U.S. 270 (1971). That is, in order to exhaust a federal claim for purposes of federal habeas corpus review, a petitioner cannot simply raise the claim in state court, citing state law, even if the state claim is analytically similar to a federal claim. See Anderson v. Harless, 459 U.S. 4 (1982);

Duncan v. Henry, 513 U.S. 364 (1995) (presentation of a "miscarriage of justice" claim under California law was not the same as an allegation of a violation of federal due process).

Furthermore, Williams is not entitled to federal review of claims which are procedurally defaulted. These include claims defaulted under an independent and adequate state procedural rule, Coleman v. Thompson, 501 U.S. 722, 750 (1992), and claims never presented to a state court, Gray v. Netherland, 116 S. Ct. 2074, 2080-81 (1996). In Virginia, no writ of habeas will be granted on the basis of any legal or factual claim which the petitioner previously could have made, but did not. See Gray, 116 S. Ct. at 2080; Slayton v. Parrigan, 215 Va. 27 (1974), cert. denied, 419 U.S. 1108 (1975). In order to overcome this procedural bar, the petitioner must demonstrate good cause for his failure to preserve the issue and prejudice resulting from the constitutional violation, Gray, 116 S. Ct. at 2080, or that there has been a fundamental miscarriage of justice, Coleman, 501 U.S. at 750.

In this case, Williams raised several of the present claims in his petition for a writ of habeas corpus before the Virginia Supreme Court. His remaining claims are exhausted because they were never raised in state court and could not be raised in state

court now. See Va. Code Ann. §§ 801.654(B)(2) and 801.654-1.

A. Defaulted Claims[3]

1. Cause and Prejudice Analysis

The U.S. Supreme Court has recognized at least three categories of "cause" which are sufficient to overcome a state procedural default: (1) counsel's inability to know of a legal or factual issue; (2) interference by the prosecution with the habeas petition; and (3) ineffective assistance of counsel. See Murray v. Carrier, 477 U.S. 478 (1986). In addition, a federal court may grant habeas relief in the "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." McCleskey v. Zant, 499 U.S. 467, 494 (1991).

2. Claims Barred under Slayton v. Parrigan

The Virginia Supreme Court ruled that several of Williams' state habeas claims were defaulted under Slayton v. Parrigan, 215 Va. 27 (1974), cert. denied, 419 U.S. 1108 (1975). Under the rule in Slayton, state habeas review is barred by the failure to raise an issue at trial and on direct appeal. Id. Slayton is a

[3] Williams has numbered the claims in his federal habeas petition differently than in his state habeas petition. To avoid confusion, the Court will refer to the numbers designated in Williams' federal habeas petition.

well-recognized bar to federal review. See Spencer v. Murray, 18 F.3d 229, 232 (4th Cir. 1994).

As a preliminary matter, Williams asserts that the Virginia Supreme Court mistakenly applied Slayton to Claims III(A)(5), III(A)(6), III(A)(7), and III(B)(11) because he raised those claims at trial and on direct appeal. A review of the record confirms that contention. Respondent correctly notes, however, that Williams did not raise these claims on federal constitutional grounds; rather, Williams solely argued matters of state law. Having failed to "fairly present" these claims as federal constitutional claims before the state's highest court, Williams cannot now "federalize" Claims III(A)(5), III(A)(6), and III(A)(7) for purposes of federal habeas review. See Picard v. Connor, 404 U.S. 270 (1971). As for Claim III(B)(11), the Virginia Supreme Court expressly ruled that it was procedurally defaulted under its Rule 5:25. Accordingly, because Williams has failed to show "cause" for the default of these claims, this Court is precluded from further reviewing Claims III(A)(5), III(A)(6), III(A)(7), and III(B)(11).

Williams can revive the remaining claims barred under Slayton if he can demonstrate cause and prejudice, or that there has been a fundamental miscarriage of justice. Williams asserts

ineffective assistance of counsel as "cause" for these defaulted claims.[4] Because it is also the freestanding theory advanced in Claim V, it is discussed as part of the general discussion in Claim V. As noted below, this Court has determined that the ineffective assistance of counsel claims set forth by Williams in Claim V are meritless. Accordingly, Williams cannot establish "cause" for the Slayton procedural default. See infra at 56-94. This Court is therefore precluded from reviewing Claims III(A)(1), III(A)(2)(a)-(c), III(A)(4), III(A)(5), III(A)(6), III(A)(7), III(B)(1), III(B)(4), III(B)(7), III(B)(8), III(B)(9), III(B)(10), III(B)(11), IV(A)(3), IV(A)(4), IV(B)(1), IV(B)(2), VI, VII(G),[5] VII(H),[6] VII(I)[7].

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[4] In order to establish "cause" for a procedural default, a claim of ineffective assistance of counsel must have been presented to the state courts as an independent claim. See Murray v. Carrier, 477 U.S. 478, 489 (1986) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)). In other words, an assertion of ineffective assistance of counsel cannot constitute "cause" excusing a procedural default where the underlying allegation of ineffectiveness is itself procedurally barred. See Justus v. Murray, 897 F.2d 709 (4th Cir. 1990).

[5] To the extent Williams relies on the prosecutor's closing arguments.

[6] Williams concedes that this claim is procedurally defaulted. See Pet'r Opp'n at 79.

[7] To the extent Williams relies on the length of time he will spend on death row.

3. Claims Never Presented in State Court

Williams failed to present the following claims at the state court level: I(A), I(C), III(A)(2)(b),[8] III(A)(2)(d),[9] III(A)(3), IV(A)(2), IV(A)(5), V(A)(3)(b),[10] V(A)(5)(b),[11] V(C)(1),[12] V(C)(2),[13] VII(A),[14] and VII(H)[15]. Despite this procedural bar, these defaulted claims will be revived for purposes of federal habeas review if Williams can show (1) cause for, and prejudice from, the default; or (2) the existence of a fundamental miscarriage of justice.

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[8] This claim is barred under Slayton. See infra at 23-24.

[9] Williams argues that Respondent has misconceptualized his argument that the trial court seated a jury predisposed to impose a death sentence in violation of Witherspoon v. Illinois, 391 U.S. 510, 521 (1968). See Pet'r Opp'n at 22. Williams asserts that he has never argued this claim independent of his claims regarding Jurors Trent, Holman, and Davis. Thus, it is a mischaracterization to state that it was never raised in state court proceedings and it should therefore not be dismissed separately.

[10] See infra at 64.

[11] See infra at 67-68.

[12] Respondent concedes that this claim was raised in Williams' state habeas petition. See Resp't Reply at 26.

[13] Respondent concedes that this claim was raised in Williams' state habeas petition. See Resp't Reply at 26.

[14] See infra at 43.

[15] See supra note 6.

Claims I(A) and IV(A)(5)

Williams claims that his constitutional rights to be tried by an impartial jury and to be tried based only on the evidence presented at trial were violated by the presence of Juror Stinnett on the jury. Juror Stinnett's former husband was Deputy Sheriff Claude B. Meinhard, the detective who interviewed Cruse about the murders and who testified for the Commonwealth. Furthermore, the prosecutor, Robert G. Woodson, Jr., had represented Deputy Meinhard during his divorce. Although asked on voir dire whether she was related to any of the witnesses or if she or any family member had ever been represented by any of the attorneys involved in the case, Juror Stinnettt never revealed her former marriage to Deputy Meinhard or that they had four children together. Prosecutor Woodson never mentioned his representation of Deputy Meinhard either. As a result, Williams argues that defense counsel could not conduct meaningful voir dire and could not intelligently exercise their peremptory challenges or challenges for cause. Thus, Williams contends that he was deprived of a fair trial under United States v. Bynum 634 F.2d 768, 771 (4th Cir. 1980).

In response, Respondent argues that Williams has procedurally defaulted these claims because he failed to raise

them on state habeas. Moreover, even if Williams could surmount the "cause" hurdle, he has failed to demonstrate "prejudice." Juror Stinnett divorced Deputy Meinhard fifteen years prior to the trial, and Deputy Meinhard was an insignificant witness for the Commonwealth. Indeed, Respondent points out that the defense did not cross-examine Deputy Meinhard, and his credibility was never at issue.

Irrespective of Deputy Meinhard's importance as a witness, however, if Williams can demonstrate "cause" for the procedural default, he will have automatically demonstrated "prejudice" under Bynum. In Bynum, the Fourth Circuit reversed a conviction because a juror, when asked whether he had a relative or close friend who had been either a defendant or victim of a crime, failed to reveal his brother's existence as a convicted felon. In so holding, the Fourth Circuit stated:

> Certainly when possible non-objectivity is secreted and compounded by the deliberate untruthfulness of a potential juror's answers on *voir dire*, the result is deprivation of the defendant's rights to a fair trial. [The juror] by his concealment impaired the right of [the defendant] to exercise intelligently a peremptory challenge to remove a juror who was suspected of being partial.

Bynum, 634 F.2d at 771 (footnotes omitted); see also United States v. Brown, 799 F.2d 134 (4th Cir. 1986) (voir dire that has

the effect of impairing the defendant's ability to meaningfully and intelligently exercise his challenges is grounds for reversal).

Like the juror in Bynum, Juror Stinnett deliberately failed to tell the truth on voir dire.

> COURT: Have you or any member of your immediate family ever been represented by [Mr. Woodson]?
>
> JURORS: (Two [Stinnettt and Carter] have no affirmative response.)

Tr. 1-3-94 at 116.

> COURT: Are any of you involved in law enforcement?
>
> JURORS: (No affirmative response.)
>
> COURT: Are any of you related to the following people who may be called as witnesses . . . Deputy Sheriff Claude Meinhard . . . ?
>
> JURORS: (No affirmative response.)

Id. at 123-24. Like the juror in Bynum, Juror Stinnett's intentional nondisclosure on voir dire gives rise to a presumption of actual bias. Assuming that Prosecutor Woodson knew of Juror Stinnett's relationship to Deputy Meinhard based on his representation of Deputy Meinhard in the divorce, his subsequent failure to advise the court or defense counsel of Juror Stinnett's dishonesty had a substantial and injurious

effect on Williams' ability to select impartial jurors.

Although Respondent argues that Williams has failed to demonstrate "cause," the Court disagrees. There is no evidence that Williams' defense or state habeas counsel knew or could have known of Juror Stinnett's relationship to Deputy Meinhard absent disclosure by the prosecutor. Because Prosecutor Woodson never notified the court or defense counsel of his prior representation of Deputy Meinhard or of his knowledge of Deputy Meinhard's relationship to Juror Stinnett, the Court finds that this information was not reasonably available to defense counsel and that they were unable to know of this issue. Accordingly, the Court will grant an evidentiary hearing on these allegations of juror and prosecutorial misconduct. The motion to dismiss this claim will be denied.

Claim I(C)

Williams argues that three jurors improperly considered his parole eligibility during the sentencing phase of his trial--specifically, the jurors reported that they believed Williams would be released after 33 years if given a life sentence. Williams now argues that the jurors' consideration of this extrajudicial evidence violated his right to be convicted solely on evidence introduced in open court. See Smith v. Phillips, 455

U.S. 209, 217 (1982).

The Court will dismiss this claim because it is procedurally defaulted. Even if Williams could demonstrate "cause," he has failed to show that the jurors' internal discussion prejudiced him. Such evidence is inadmissible under Rule 606(b) of the Federal Rules of Evidence, and Williams has failed to prove that the jury's internal discussion of parole constitutes impermissible "extrajudicial" evidence to circumvent Rule 606(b)'s bar.

Claim III(A)(3)

Williams argues that the trial court erred when it refused to permit in-depth individual questioning on voir dire regarding pretrial publicity. Respondent asserts that this claim is procedurally defaulted because Williams failed to raise it in state court. Because Williams offers no "cause" for the default, the Court will dismiss this claim.

Claim IV(A)(2)

In September 1993, while incarcerated for the Keller murders, Cruse was evaluated by a psychiatrist who reported that "[Cruse] has little recollection of [the Keller murders], other than vague memories, as he was intoxicated with alcohol and marijuana at the time." Pet'r Ex. D. Despite being ordered to

disclose all Brady material, the Commonwealth failed to provide this report to Williams' defense counsel. Williams now argues that this violation substantially impaired his ability to cross-examine and impeach Cruse.

The prejudice resulting from the Commonwealth's failure to comply with its Brady obligations is clear. As noted in the discussion of Claim IV(A)(1), Cruse played a critical role in the Commonwealth's case against Williams. Because both defendants offered drastically different versions of the shootings, Cruse's testimony on the triggerman issue and his credibility as a witness determined who would be convicted of capital murder. Information that Cruse had little to no recollection of the murders would have undoubtedly undermined his credibility and cast doubt on his ability to remember the shootings with such detail.

Irrespective of this showing of "prejudice," Respondent argues that this claim is procedurally defaulted because Williams has failed to demonstrate why this claim could not have been discovered with due diligence in time to be raised in state court. The Fourth Circuit has held that "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a

defendant is not entitled to the benefit of the Brady doctrine." Hoke v. Netherland, 92 F.3d 1350, 1355 (4th Cir.) (citation omitted), cert. denied, 117 S. Ct. 630 (1996).

Although defense counsel were entitled to rely on the belief that the prosecution would comply with the Constitution and thus produce all Brady material upon request,[16] Williams fails to explain to the Court how the report came to the attention of federal habeas counsel and why it could not have been previously discovered through the exercise of due diligence on the part of state habeas counsel. Williams has apparently been afforded the same type of assistance at both state and federal habeas--namely, court-appointed attorneys. The Court cannot discern any reason and has been offered no explanation why state habeas counsel failed to discover the report and present it in state habeas proceedings. Accordingly, the Court will dismiss this claim.

VI. CLAIMS ADDRESSED ON THE MERITS

A. Applicable Law

1. Standard of Review

Under the recently revised Title 28 United States Code Section 2254, a federal court may not grant a writ of habeas

[16] See Dobbs v. Zant, 113 S. Ct. 835, 836 (1993).

corpus based on any claim that was adjudicated on the merits in state court unless the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Although this new standard requires more deference to state court findings, it is not a complete abdication of the federal court's duty to provide meaningful review.

2. Harmless Error

Federal habeas courts routinely conduct harmless error analysis of errors occurring in capital cases. See, e.g., Cabana v. Bullock, 474 U.S. 376, 391 n.6 (1986); Smith v. Dixon, 14 F.3d 956, 978 (4th Cir.) (en banc), cert. denied, 513 U.S. 841 (1994). In federal habeas corpus proceedings, an error is deemed harmful only if it "had substantial and injurious effect or influence in determining the jury's verdict." Chapman v. California, 386 U.S. 18, 24 (1967) (citing Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quotation omitted)).

3. New Rule Doctrine

Where a federal habeas petitioner seeks relief by application of a constitutional rule, the Court must examine the rule to determine whether it had been announced at the time the petitioner's conviction became final or whether the petitioner is seeking an extension of longstanding precedent. As a general matter, federal courts may not grant state prisoners relief in collateral proceedings if to do so would create a "new rule" of constitutional law, subject to two narrow exceptions.[17] See Teague v. Lane, 489 U.S. 288 (1989). Since Teague, the U.S. Supreme Court has articulated the test to determine whether a rule is a "new rule" such that it should not be applied retroactively:

> Though we have offered various formulations of what constitutes a new rule, put "meaningfully for the majority of cases, a decision announces a new rule 'if the result was not dictated by precedent existing at the time the defendant's conviction became final.'"

Gilmore v. Taylor, 508 U.S. 333, 340 (1993) (citation omitted).

[17] Under Teague, a "new rule" should be applied retroactively if (1) it "plac[es] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or (2) it is a "watershed rule[] of criminal procedure," implicating the fundamental fairness and accuracy of the criminal proceeding. Teague v. Lane, 489 U.S. 288, 311 (1989).

Where the petitioner requests the Court not to apply a rule announced after his conviction became final, but to adopt a rule not previously announced, the Court must first determine whether such a rule would be retroactively applied if adopted. If the court determines that the rule, if adopted, would not be retroactively applied, then the Court should dismiss the claim without reaching the merits. See Penry v. Lynaugh, 492 U.S. 302 (1989). Under Teague, a court faced with this situation should proceed in three steps. First, the Court must ascertain the date on which the conviction and sentence became final. Second, the Court must determine whether a state court considering the defendant's claim on that date would have felt compelled by existing precedent to conclude that the rule sought by the petitioner was required by the Constitution. Third, even if the Court determines that the petitioner seeks the benefit of a new rule, the Court must decide whether the rule falls into one of the two Teague exceptions. See Caspari v. Bohlen, 510 U.S. 383, 389 (1994).

Even if the Court determines that the petitioner does not seek to apply or adopt a "new rule", the Court must still "inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting,

thereby extending the precedent." Stringer v. Black, 503 U.S. 222, 228 (1992). The Court should be mindful, however, that the "new rule" doctrine is not necessarily implicated every time the Court applies an established standard to a new set of facts. See id.

B. Claims Barred Under Hawks v. Cox

The Virginia Supreme Court ruled that Claims II(A), III(A)(8), III(B)(3), III(B)(5), III(B)(6), VII(A), VII(B), VII(C), VII(D), VII(E), VII(F), VII(G), and VII(I) were barred under the rule in Hawks v. Cox, 211 Va. 91 (1970). "Hawks, however, is not a true procedural default rule. . . . Hawks cannot prevent federal habeas review of federal constitutional claims properly raised on direct appeal." Turner v. Williams, 35 F.3d 872, 890 (4th Cir. 1994) (citation omitted), overruled on other grounds, O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996). Therefore, the Court must determine whether Williams raised the aforementioned claims on direct appeal.

A review of the record indicates that Williams did present the claims, albeit more general versions, on direct appeal of his conviction. The record further discloses that the Virginia Supreme Court adjudicated those claims on the merits. Although this Court has reviewed the aforementioned claims, it may only

grant relief in limited circumstances. See 28 U.S.C. § 2254(d). As demonstrated below, none of the statutory exceptions apply and the Court will not grant relief as to these claims.

Claim II(A)

Williams argues that the evidence adduced at trial was insufficient to establish beyond a reasonable doubt that he was the "triggerman." Under Virginia law, only the immediate perpetrator of a murder may be convicted of capital murder and only after being found beyond a reasonable doubt to be the triggerman who fired the fatal shot. See Va. Code § 18.2-18; Johnson v. Commonwealth, 220 Va. 146, 150 (1979), cert. denied, 454 U.S. 920 (1981). Williams argues that given the facts in his case, it is impossible to determine whether he or Cruse fired the fatal shots. Williams accordingly argues that even if the Court is unwilling to reverse at the guilt stage, he should be granted a new sentencing hearing in order to determine on which capital convictions the jury recommended the death penalty.

In evaluating a claim based on insufficiency of the evidence, the reviewing court must view the evidence in the light most favorable to the prosecution. See Jackson v. Virginia, 443 U.S. 307, 319 (1979). The critical inquiry is "whether the record evidence could reasonably support a finding of guilt

beyond a reasonable doubt." Id. at 318. "But this inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 318-19.

The evidence at trial painting Williams as the triggerman primarily consisted of the testimony of Cruse. Cruse testified that Williams fired all of the shots that killed Mr. Keller and fired two of the three shots that killed Mrs. Keller. Williams himself admitted to firing the first shot into Mr. Keller's head. While the physical evidence does not directly prove that Williams was the triggerman, Cruse's testimony and Williams' own testimony, when viewed in the light most favorable to the Commonwealth, convincingly demonstrate that Williams played a "direct part in inflicting injuries" and is thus liable for capital murder. See Strickler v. Commonwealth, 241 Va. 482, cert. denied, 502 U.S. 944 (1991). Williams' argument that Cruse fired the first and fatal shot at Mrs. Keller was presented to the jury and the Virginia Supreme Court which found that it did

not have merit in the face of the other testimony linking Williams to the shootings. Simply, the jurors chose to believe Cruse over Williams, and credibility determinations are properly within their province. Thus, after reviewing the evidence in the light most favorable to the prosecution, the Court finds that a rational trier of fact could have found beyond a reasonable doubt that Williams, and not Cruse, was the triggerman.

Claim III(A)(8)

Williams argues that the trial court erred when, over defense counsel's objection, it allowed the prosecutor to impeach Williams' testimony by referring to the fact that Williams was the only witness permitted to stay in the courtroom and thus, hear the testimony of all the other witnesses. Williams contends that this error impermissibly burdened his constitutional right to confront his accusers, to be present at all times during his trial, to present evidence in his favor, and to compel process. Respondent argues, however, that existing case law does not prohibit a prosecutor from commenting in such a manner and that to grant federal collateral relief on this claim would violate the "new rule" doctrine.

A survey of existing case law confirms Respondent's contention. Although Williams argues that Griffin v. California,

380 U.S. 609 (1965) (Fifth Amendment violation to comment on the defendant's failure to take the witness stand), and Brooks v. Tennessee, 406 U.S. 605 (1972) (Fifth Amendment violation to require the defendant to testify first for the defense or not at all), implicitly support his position, the Court finds that the result urged by Williams is not dictated by existing precedent. To hold otherwise would create a "new rule" which this Court is severely restricted from doing under Teague and its progeny.

Although the Court has concerns about the propriety of the prosecutor's comments in this particular case, prosecutorial impeachment of the defendant's testimony through this type of cross-examination has not yet been held violative of the defendant's constitutional rights--notwithstanding Williams' persuasive Brooks argument to the contrary. Although the Court must thus deny Williams relief on this claim, a final point needs to be made. In rejecting this claim on direct appeal, the Virginia Supreme Court stated "[w]e fail to see how [Williams' constitutional] rights are violated by a question that reflected what the jury already knew." Williams, 248 Va. at 544. In Griffin, the U.S. Supreme Court rejected this exact rationale in the context of prosecutorial comment on the defendant's failure to testify:

> What a jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

380 U.S. at 614-15. This Court similarly finds this aspect of the Virginia Supreme Court's justification for dismissing the claim erroneous and unpersuasive.

Claim III(B)(3)

Williams argues that the trial court erred in denying his motion for jury instructions on the meaning of a life sentence and his mandatory 30 year ineligibility for parole. In support of this argument, Williams cites Simmons v. South Carolina, 114 S. Ct. 2187 (1994), wherein the U.S. Supreme Court held that a sentencing jury must be instructed that a capital defendant is ineligible for parole when the prosecution argues "future dangerousness." Recently, however, the U.S. Supreme Court held that Simmons constitutes a "new rule" for purposes of habeas review and thus, cannot be used to overturn a habeas petitioner's death sentence. See O'Dell v. Netherland, 117 S. Ct. 1969 (1997). Accordingly, Williams' claim which seeks "a logical and modest extension" of Simmons is likewise barred under the Teague doctrine.

Claim III(B)(5)

Williams argues that the trial court erred in allowing the prosecutor to present evidence of the unadjudicated Prince Edward County homicides at the penalty stage as proof of "future dangerousness." Courts have uniformly rejected the argument that evidence of prior unadjudicated criminal conduct cannot be considered in assessing "future dangerousness." See, e.g., Eaton v. Angelone, 1998 WL 128570, *9 (4th Cir. 1998) (citing cases); see also Jurek v. Texas, 428 U.S. 262, 276 (1976) (stating that the jury must "have before it all possible relevant information about the individual defendant whose fate it must determine"). Thus, the Virginia Supreme Court's rejection of Williams' claim was not contrary to, or an unreasonable application of, clearly established federal law.

Claim III(B)(6)

Williams argues that not only did the trial court err in allowing evidence of unadjudicated crimes, but that it failed to instruct the jury that such crimes must be proved beyond a reasonable doubt in order to be used in the sentencing determination. This Court has repeatedly rejected claims that Virginia's "future dangerousness" factor is unreliable because it may be proved with evidence of unadjudicated crimes. See, e.g.,

Breard v. Netherland, 949 F. Supp. 1255, 1267 (E.D. Va. 1996) (Williams, J.), aff'd, 134 F.3d 615 (4th Cir. 1998); Pruett v. Thompson, 771 F. Supp. 1428, 1442-43 (E.D. Va. 1991) (Spencer, J.), aff'd, 996 F.2d 1560 (4th Cir.), cert. denied, 510 U.S. 984 (1993); see also Richardson v. Johnson, 864 F.2d 1536, 1541 (11th Cir.) (citing cases), cert. denied, 490 U.S. 1114 (1989). Accordingly, the trial court did not err in refusing to instruct the jury that the unadjudicated Prince Edward County homicides must be proved beyond a reasonable doubt.

Claim VII(A)

Williams argues that the Virginia death penalty statutes are unconstitutional as they fail to provide the jury with any guidance on the meaning and use of mitigation evidence. The Fourth Circuit, however, has routinely rejected the claim that the standard Virginia sentencing instruction does not adequately inform the jury on the issue of mitigation. See, e.g., Buchanan v. Angelone, 103 F.3d 344, 347-48 (4th Cir. 1996) (holding that "Virginia's death penalty scheme survives constitutional scrutiny, despite its 'failure to instruct the jury on statutory mitigating factors'") (citation omitted); Jones v. Murray, 947 F.2d 1106, 1119-20 (4th Cir. 1991), cert. denied, 503 U.S. 973 (1992); Clozza v. Murray, 913 F.2d 1092, 1005 (4th Cir. 1990),

cert. denied, 499 U.S. 913 (1991). In light of this precedent, Williams' claim must fail.

Claims VII(B) and VII(C)

Williams argues that the "vileness" aggravating factor is unconstitutionally vague in that it does not define what constitutes "outrageously or wantonly vile, horrible or inhuman [conduct]." Va. Code § 19.2-264.4(C). The Virginia Supreme Court rejected this challenge outright as already addressed and answered by the decision in Mickens v. Commonwealth, 247 Va. 395, 402-403 (1994). The Fourth Circuit has likewise rejected this challenge on numerous occasions. See, e.g., Turner v. Williams, 35 F.3d 872, 891-94 (4th Cir. 1994); Jones v. Murray, 976 F.2d 169, 174 (4th Cir.), cert. denied, 505 U.S. 1245 (1992). The Court rejects Williams' claims for the same reasons.

Claims VII(D), VII(E), and VII(F)

In attacking the "future dangerousness" aggravating factor, Williams argues that it is unconstitutionally vague, misleading, and unreliable and that the use of unadjudicated criminal acts is improper. Fourth Circuit case law holds otherwise. See Spencer v. Murray, 5 F.3d 758, 764-65 (4th Cir. 1993), cert. denied, 510 U.S. 1171 (1994); Giarratano v. Procunier, 891 F.2d 483, 489-90 (4th Cir. 1989), cert. denied, 498 U.S. 881 (1990). Furthermore,

for the reasons stated above with respect to Claims III(B)(5) and III(B)(6), the Court rejects these claims.

Claim VII(G)

Williams claims that the Virginia Supreme Court failed to engage in meaningful or fair appellate review of his case under Va. Code § 17-110.1, which requires the court to ensure that the death penalty was not "imposed under the influence of passion, prejudice or any other arbitrary factor." A review of existing case law reveals, however, that the existence of such a claim has never been recognized or alluded to by the U.S. Supreme Court. See George v. Angelone, 901 F. Supp. 1070, 1090 (E.D. Va. 1995), aff'd, 100 F.3d 353 (4th Cir. 1996), cert. denied, 117 S. Ct. 854 (1997). Accordingly, the Court must dismiss Williams' challenge to the state appellate process as barred by the "new rule" doctrine.

Claim VII(I)

Williams argues that imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment. The Virginia Supreme Court, however, rejected this claim as already answered in Beaver v. Commonwealth, 232 Va. 521, 527, cert. denied, 483 U.S. 1033 (1987). The Fourth Circuit similarly has rejected this argument outright. See Briley v.

Booker, 746 F.2d 225, 227 (4th Cir. 1984). Accordingly, this Court must also reject this claim of constitutional error.

C. Preserved Claims

1. Juror Misconduct

Claim I(B)

Williams asserts that a juror may have introduced extrajudicial evidence to the jury. Specifically, Williams claims that Juror Blanton may have received information from her husband, a Virginia State Trooper, who had previously arrested Williams on unrelated charges. Although the jury was sequestered during the trial, the jurors were allowed to return home after being selected. It is during this brief period of time that Williams believes Juror Blanton learned of his previous arrests from her husband--extrajudicial information which she may have then shared with her fellow jurors.

It is well-settled that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . ." Remmer v. United States, 347 U.S. 227, 229 (1954). In the Fourth Circuit, this presumption of prejudice is established if "there is a reasonable possibility that the jury's verdict was influenced by the

material that improperly came before it." United States v. Barnes, 747 F.2d 246, 250 (4th Cir. 1984) (citations and quotations omitted).

In the instant case, however, Williams has failed to provide any evidence that Juror Blanton's husband told her about the previous arrests or that if factual, Juror Blanton shared this information with the other jurors. This omission is particularly glaring in light of the unrebutted affidavit submitted by Juror Blanton in the state habeas proceedings. See Resp't State Ex. E. In that affidavit, Juror Blanton unequivocally denies Williams' allegations. She states that she answered the trial court's voir dire questions truthfully; she never discussed the case with her husband until the trial concluded; no extrinsic information was communicated to her; and she had no knowledge of Williams' prior record until evidence of it was introduced at trial. See id. Although Williams is correct that the burden is on the government to prove that the jury's exposure to extrajudicial information was harmless, the Court need not reach that issue here because Williams has failed to establish the threshold issue--that extrajudicial information was, in fact, introduced to the jury.

In the absence of any rebuttal evidence, the Court does not find that the Virginia Supreme Court's dismissal of this claim

was contrary to clearly established precedent or the result of an unreasonable determination of the facts. See 28 U.S.C. §§ 2254(d), (e). Accordingly, this claim will be dismissed.

2. Insufficiency of the Evidence

In evaluating a claim based on insufficiency of the evidence, the reviewing court must view the evidence in the light most favorable to the prosecution. See Jackson v. Virginia, 443 U.S. 307, 319 (1979). The critical inquiry is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Id. at 318. "But this inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 318-19.

Claim II(B)

Williams argues that the evidence adduced at trial was insufficient to establish beyond a reasonable doubt that the robbery and rape were committed sufficiently close in time and place to the shooting of the Kellers to elevate their subsequent

murders to capital murder. Williams asserts that "[t]he rape and robbery had been completed long before the murders occurred." Pet. at 39. The Court finds that this assertion is clearly unsupported by the evidence.

It is undisputed that Williams and Cruse went to the Kellers' house intending to commit robbery. While there, Williams and Cruse ordered the Kellers to remove all their clothes, locked them in closets, searched the house, raped Mrs. Keller, and forced the Kellers to "take a walk" after they had showered and changed into clean clothes. Shortly thereafter, Williams and Cruse killed the Kellers so as to not leave any witnesses. Based on the foregoing, the Court finds that the record amply supports the conclusion that the rape and robbery were sufficiently close in time and place to the murders to be predicate felonies for the capital conviction. Accordingly, this claim must be dismissed.

3. Trial Court Errors

Claim III(B)(2)

Williams claims that the trial court erred when it granted his request for a Bill of Particulars only as to prior unadjudicated acts of criminal conduct on the issue of "future dangerousness." Williams contends that had the trial court

required the Commonwealth to specify before trial the components of the "vileness" aggravator, the Commonwealth would not have mistakenly introduced the photographs of the Prince Edward County victims to prove "vileness" and/or defense counsel would have had the opportunity to file a motion in limine in order to prevent the submission of the photographs. Williams argues that this error violated his Sixth Amendment right to be informed of the nature of the charges against which he must defend. See, e.g., In re Ruffalo, 390 U.S. 544 (1968); Cole v. Arkansas, 333 U.S. 196 (1948); Rosen v. United States, 161 U.S. 29 (1896).

On direct appeal, the Virginia Supreme Court rejected this due process claim:

> In our opinion, due process does not require that the Commonwealth limit itself to a pre-trial construction of the character of Williams's conduct. Furthermore, Williams has no constitutional right to a bill of particulars if the indictments are sufficient to give him notice of the nature and character of the offenses charged, which these indictments do, so that he can make his defense. *Strickler v. Commonwealth*, 241 Va. 482, 490-91, 404 S.E.2d 227, 233, *cert. denied*, 502 U.S. 944 (1991); *Spencer v. Commonwealth*, 238, [sic] Va. at 303-304, 384 S.E.2d at 791.

Williams, 248 Va. at 538. Respondent argues that this Court must defer to the Virginia Supreme Court's reasonable rejection of Williams' claim and that to grant federal collateral relief would

violate the "new rule" doctrine.

Pursuant to a recent U.S. Supreme Court decision, Gray v. Netherland, 116 S. Ct. 2074 (1996), the Court finds that Respondent is correct. In Gray, the U.S. Supreme Court held that granting relief on a petitioner's claim that he had a due process right to be given adequate notice of the evidence to be used against him during the penalty stage of his capital murder trial would require the adoption of a "new rule." See id. at 2084. Although Williams argues that he was not requesting "penalty-stage discovery," the Court finds otherwise. Because federal habeas relief is not available on a "notice-of-evidence" claim, the Court must dismiss this claim.

4. Prosecutorial Misconduct

Claim IV(A)(1)

Williams alleges that the Commonwealth violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose to the defense that Cruse did in fact have an agreement with the Commonwealth for a life sentence in exchange for his testimony against Williams. Respondent points out, however, that both the Commonwealth's Attorney and Cruse's attorney have confirmed under oath that Cruse had no formal plea agreement with the Commonwealth at the time of Williams' trial. See Resp't State

Ex. C, D (affidavits).

It is undisputed that prior to trial, the Commonwealth informed defense counsel that a plea agreement had previously been reached with Cruse, that the agreement had been breached by Cruse, and that the Commonwealth had revoked the agreement. However, the Commonwealth never produced a copy of the revoked written plea agreement to defense counsel. In fact, until the agreement was introduced by the Commonwealth at trial, defense counsel had thought that the agreement had been oral. See Aff. of R. Donald Ford, Jr. ¶ 8.

In any event, Williams contends that Cruse and the Commonwealth did have an understanding that Cruse would not receive the death penalty in return for his cooperation and testimony against Williams. In support of this allegation, Williams proffers the following:

(1) statements made by Cruse and the prosecutor during Cruse's direct and redirect examination which indicated that a plea agreement was expected as a result of Cruse's testimony against Williams;

> Q: You've indicated to the jury you're charged with capital murder right now; is that correct?
> A: Correct.
> Q: Is it your understanding that the Judge is going to decide whether you live or die?
> A: Correct.
>
> Tr. 1-4-94 at 212 (emphasis added).

(2) statements made by the prosecutor during closing arguments which raised a clear inference that there was a direct relationship between the content of Cruse's testimony and his sentence on charges of capital murder;

> [Cruse] sits here today facing the death penalty; he sits here facing capital murder, two counts of capital murder. And like he told you right now his back is against the wall; if he lies, he dies, and that is his situation.
>
> Tr. 1-6-94 at 52 (emphasis added).

(3) Cruse's plea of guilty to the capital murder of Mrs. Keller two months after Williams' conviction;

(4) the reduction of the charge of first degree murder of Mr. Keller to participation as a principal in the second degree;

(5) the fact that Cruse pled guilty before a trial date was ever set in his case; and

(6) the Commonwealth's sentencing recommendation that Cruse's life be spared.

Williams argues that when viewed together, this sequence of events strongly suggests that some sort of understanding or informal agreement existed between Cruse and the Commonwealth at the time of Williams' trial.

In dismissing this claim, the Virginia Supreme Court provided no insight as to the manner or reason by which it made its factual or legal determinations. The deferential standard mandated by 28 U.S.C. § 2254(d) therefore has less meaning in

this situation. See Cardwell v. Netherland, 971 F. Supp. 997 (E.D. Va. 1997). The Court is mindful, however, that its review is restricted to those facts as presented in state court proceedings.

Pursuant to Brady, the Commonwealth is required to disclose evidence that is favorable to the defendant and "material either to guilt or punishment." Brady, 373 U.S. at 87. This includes impeachment evidence because "such evidence is 'evidence favorable to an accused,' [] so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." United States v. Bagley, 473 U.S. 667, 676 (1985) (internal citation omitted). Disclosure of such evidence is especially important where, as here, "the reliability of a given witness may well be determinative of guilt or innocence[.]" Id. at 677.

In the instant case, Cruse played a critical role in the Commonwealth's case against Williams. It is undisputed that the physical evidence could not conclusively establish who fired the fatal shots. Not only could it not be determined in what sequence the shots were fired, but the bullet fragments from Mr. Keller's wounds could not be identified. Given that both Cruse and Williams offered drastically different versions of the

shootings,[11] Williams' conviction clearly hinged on the credibility of each defendant. As evidenced by the jury's verdict, the jury chose to believe Cruse over Williams. Had the jury known that Cruse had some sort of agreement, understanding, or expectation with the Commonwealth regarding his sentence for the Keller murders, there is little doubt that their assessment of Cruse's credibility would have been affected. As the U.S. Supreme Court has stated, "[t]he fact that the stake [in the petitioner's conviction] was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction." Bagley, 473 U.S. at 683.

Accordingly, Williams was entitled to know whether any informal understanding had been reached between Cruse and the Commonwealth prior to or at the time of Cruse's testimony at trial. There being no evidence that defense counsel had any knowledge of or access to such information other than the revoked

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[11] Cruse testified that he fired only once--at Mrs. Keller--and that Williams fired all other shots. Williams, however, testified that he fired only once--the non-fatal wound to Mr. Keller's head--and that Cruse fired all other shots, including the three shots to Mrs. Keller's head.

written plea agreement,[19] the Court will grant Williams an evidentiary hearing on this claim. The motion to dismiss will be denied.

5. Ineffective Assistance of Counsel

In Strickland v. Washington, 466 U.S. 668 (1984), the U.S. Supreme Court set forth the standard for determining whether a criminal defense lawyer has acted so egregiously as to deprive the defendant of his Sixth Amendment right to counsel. Petitioner must establish two elements: first, that counsel's performance was deficient; and second, that the deficient performance prejudiced the defendant. See id. at 687. This is an exacting standard: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relief on as having produced a just result." Id. at 686.

Under the first prong, the petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id. at 687-88. In order to avoid the

[19] Hoke v. Netherland, 92 F.3d 1350, 1355 (4th Cir.), cert. denied, 117 S. Ct. 630 (1996); United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990).

distorting effects of hindsight, however, the Court must evaluate "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. The Court "must [also] appreciate the practical limitations and tactical decisions that trial counsel faced." Bunch v. Thompson, 949 F.2d 1354, 1363 (4th Cir. 1991), cert. denied, 505 U.S. 1230 (1992). Rather than second-guessing decisions which are the result of trial tactics or strategy, the reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689; see also Williams v. Dixon, 961 F.2d 448, 451 (4th Cir.), cert. denied, 506 U.S. 991 (1992); McDougall v. Dixon, 921 F.2d 518, 539 (4th Cir. 1990), cert. denied, 501 U.S. 1223 (1991).

The second prong of the Strickland test, the "prejudice" inquiry, requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable." 466 U.S. at 687. Accordingly, the petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a "probability sufficient to undermine confidence

in the outcome." Id. Counsel's errors, even if unreasonable, must be shown to have "actually had an adverse effect on the defense." Id. at 693.

When analyzing ineffective assistance of counsel claims involving appellate counsel, the Fourth Circuit has held that appellate counsel are "entitled to a presumption that [they] decided which issues were most likely to afford relief on appeal." Evans v. Thompson, 881 F.2d 117, 125 (4th Cir. 1989), cert. denied, 497 U.S. 1010 (1990). Furthermore, counsel are not obligated to assert all non-frivolous issues. Rather, "[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from incompetence, is the hallmark of effective appellate advocacy." Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir. 1989), cert. denied, 493 U.S. 946 (1990) (quotations and citations omitted).

The Virginia Supreme Court has considered and rejected the ineffective assistance of counsel claims discussed below. Under the new standard set forth in § 2254(d), this Court's review is limited to a determination of whether or not the Virginia Supreme Court's resolution of these claims was a reasonable interpretation of the Strickland standard and other relevant U.S. Supreme Court precedent. However, this Court notes that the

Virginia Supreme Court issued a one page summary order in Williams' state habeas petition.[20] Where the Virginia Supreme Court provides no insight as to the manner or reason by which it applied federal law to the facts of the case, a federal court must necessarily perform its own review of the record. The deferential standard mandated by § 2254(d)(1) has less meaning in this situation. See Cardwell v. Netherland, 971 F. Supp. 997 (E.D. Va. 1997).

Claim V(A)(1)

In his federal habeas petition, Williams argues that defense counsel's performance was constitutionally deficient because (1) counsel failed to object to the trial court's erroneous charge on the triggerman rule and the degrees of murder, and (2) counsel failed to preserve the claims regarding the trial court's refusal to give Williams' proposed Instructions #19 and #20.

On direct appeal, the Virginia Supreme Court, citing Strickler v. Commonwealth, 241 Va. 482, cert. denied, 502 U.S. 944 (1991), ruled that the trial court's Instruction #18

[20] Specifically, the Virginia Supreme Court held that it found "no merit in petitioner's remaining allegations" and ordered that Williams' state habeas petition be dismissed. Order Upon a Petition for a Writ of Habeas Corpus, issued by the Virginia Supreme Court, March 18, 1996.

correctly stated the triggerman rule. See Williams, 248 Va. at 545. Under Virginia law, only the immediate perpetrator of a murder may be convicted of capital murder. See Va. Code § 18.2-18; Johnson v. Commonwealth, 220 Va. 146, 150 (1979), cert. denied, 454 U.S. 920 (1981). "[W]here two or more persons take a direct part in inflicting fatal injuries, [however,] each joint participant is an 'immediate perpetrator' for the purposes of the capital murder statutes." Strickler, 241 Va. at 495. Although there is conflicting evidence as to which shot actually killed the Kellers, Cruse's testimony and Williams' own testimony convincingly demonstrate that Williams played a "direct part in inflicting fatal injuries" and thus, is liable as an "immediate perpetrator" of the Kellers' murders. See id. That being the case, the Court finds that the trial court did not give an erroneous charge and that defense counsel did not perform ineffectively by failing to object.

As for defense counsel's failure to preserve the claims regarding the trial court's rejection of Williams' proposed instructions, the Virginia Supreme Court ruled that pursuant to Jenkins v. Commonwealth, 244 Va. 445, 460-61 (1992), cert. denied, 507 U.S. 1036 (1993), Williams had waived those claims because counsel merely "incorporate[d] by reference" the argument

made in the trial court for consideration on appeal. See Williams, 248 Va. at 545. Assuming arguendo that counsel's performance was deficient in this regard, Williams must still demonstrate prejudice. He fails to do so in this case. The proposed instructions were not only a misstatement of Virginia law, but they directly contradicted the charge which was ultimately given to the jury--a charge which the Virginia Supreme Court found to be a correct statement of Virginia law. Accordingly, the Court finds that Williams has failed to satisfy either prong of the Strickland test.

Claim V(A)(2)

Williams essentially argues that defense counsel failed to effectively impeach Cruse's testimony. Specifically, Williams takes issue with the following acts or omissions of defense counsel: (1) failure to object to leading questions; (2) failure to cross-examine Cruse on the rape of Mrs. Keller, his alleged breach of the plea agreement, his motives for testifying, his failure to take a polygraph examination as required by the plea agreement, the written plea agreement, his consumption of alcohol on the night of the murders, and his ability to recall the details of that night; (3) failure to interview Cruse or his lawyers regarding the nature, extent, or existence of a plea

agreement; and (4) failure to interview law enforcement officers regarding the nature, extent, or details of any statements made by Cruse to law enforcement officers.

To refut Williams' allegations, Respondent has submitted the unrebutted affidavit of Williams' defense counsel which was filed in the state habeas proceedings. Among other things, the affidavit details defense counsel's investigation into and preparation for Cruse's testimony. Specifically, defense counsel reviewed the Commonwealth's investigative file, Cruse's criminal record, Cruse's statements to the police, and Cruse's testimony at the preliminary hearings; interviewed the primary State Police investigator and the attorneys who represented Cruse at the preliminary hearings; and created a strategy to paint Cruse as "a person who repeatedly had lied to the police, and who, although he said he no longer had a plea agreement, was testifying the way he thought the prosecution wanted him to testify about Williams' role in the offenses in order to save his own life." Resp't Federal Ex. D at 3. In light of defense counsel's representations, it appears that Williams' complaints amount to little more than second-guessing a trial strategy that did not work. Accordingly, the Court finds that Williams has failed to bear his burden of proving deficient performance and prejudice

under Strickland.

Claim V(A)(3)

Williams claims that defense counsel were ineffective because they failed to investigate, develop, and present evidence of voluntary intoxication as a defense and to impeach his co-defendant, Cruse, with evidence of his intoxication. Although Respondent addresses Williams' claim regarding intoxication as a defense, he argues that the claim regarding counsel's failure to impeach Cruse is defaulted because it was never raised in state court. The Court will address each contention in turn.

a. Intoxication as a Defense

The affidavit submitted by Williams' defense counsel belies his claim that they were ineffective in failing to mount a voluntary intoxication defense. In fact, the affidavit demonstrates that after a reasonable investigation, counsel determined that voluntary intoxication would not be a viable defense in Williams' case. Counsel based this conclusion on their multiple interviews with Williams in which he repeatedly gave "a consistent, coherent account" of the Kellers murders and Prince Edward County homicides; thorough research of Virginia law on the issue of voluntary intoxication as a defense to premeditated murder; and Williams' own testimony at the guilt

stage of trial. In counsel's opinion, Williams had the capacity for premeditation and the ability to act upon his plans, irrespective of the amount of alcohol or types of drugs he had consumed. Under Strickland, counsel's strategic decision to forego a voluntary intoxication defense after a reasonable investigation of that defense cannot be said to be so outside "the wide range of reasonable professional assistance[]" so as to constitute ineffective assistance of counsel. Strickland, 466 U.S. at 689.

b. Intoxication to Impeach Cruse

In his state habeas petition, Williams claimed ineffective assistance of counsel with respect to defense counsel's failure to argue intoxication to the jury as a basis for impeaching Cruse's testimony. In his federal habeas petition, Williams' claim is that defense counsel failed to cross-examine Cruse on the issue of intoxication. Respondent contends that the claims are distinct and having failed to present the latter in state court, Williams is barred from raising it on federal habeas review. The Court agrees.

Claim V(A)(4)

Williams premises this ineffective assistance of counsel claim on defense counsel's failure to object when the trial court

allegedly omitted a jury charge on the Commonwealth's burden of proving beyond a reasonable doubt that Williams committed the crimes. Respondent contends that the record clearly refutes this claim.

During both the jury selection process and at the guilt stage, the trial court repeatedly informed the jurors that Williams was presumed innocent "and not guilty unless and until the Commonwealth proves each and every element beyond a reasonable doubt." See, e.g., Tr. 1-3-94 at 20-21, 119-120, 155-156, 210-211, 264-265; 1-6-94 at 9. Furthermore, in the instructions listing the elements of each charged offense, the trial court stated that "the Commonwealth must prove beyond a reasonable doubt each of the following elements." Tr. 1-6-94 at 11-22. The trial court also instructed the jury that "[t]here is no burden on the defendant to produce any evidence." See, e.g., Tr. 1-6-94 at 10.

Based on the foregoing, the Court is hard-pressed to find how defense counsel's performance could be deficient in this case when the record clearly shows that the trial court did instruct the jury on the burden of proof. Accordingly, the Court finds that Williams has failed to satisfy the Strickland test.

Claim V(A)(5)

Williams claims that defense counsel were ineffective on voir dire. Specifically, Williams argues that defense counsel failed to object to the trial court's alleged errors on voir dire, failed to rehabilitate three specific jurors, failed to object to confusing and misleading prosecutorial questions, failed to preserve the issue for appellate review, and failed to conduct extensive voir dire on the issue of pretrial publicity

a. Failure to Protect Right-to-Life Qualification Questions

1. & 2. Jurors Trent and Holman

The transcript of the jury selection proceedings reveals that Jurors Trent and Holman initially indicated that they could fairly consider giving the death penalty. Upon further questioning, however, Jurors Trent and Holman expressed serious reservations about imposing a death sentence regardless of the evidence presented and the instructions given by the court. Although the paper record is somewhat confusing as to the equivocal answers given by Jurors Trent and Holman, this Court is required to give deference to the state trial judge's findings of fact. See § 2254(e)(1). This Court must also refrain from second-guessing defense counsel's tactical decisions to not

object to the prosecutor's questions, attempt further rehabilitation, or object to the exclusion for cause of Jurors Trent and Holman. Even assuming arguendo that defense counsel were deficient, Williams has failed to come forth with clear and convincing evidence to rebut the trial court's finding that Jurors Trent and Holman could not impartially consider imposing a death sentence. Accordingly, the Court finds that Williams has failed to satisfy the Strickland test.

3. Juror Bernard

Both the prosecution and the defense agreed to strike Juror Bernard for cause. Defense counsel's affidavit clearly demonstrates that counsel made a strategic decision to not object to the prosecutor's challenge for cause because "we were of the opinion that, on balance, the juror's answers indicated she would be a pro-prosecution juror." Resp't Federal Ex. D at 2. Absent evidence to the contrary, the Court will not second-guess defense counsel's tactical decision. Furthermore, Williams has failed to demonstrate that except for counsel's failure to object to the removal of Juror Bernard for cause, there is a reasonable probability that the outcome of the proceeding would have been different.

b. Failure to Challenge Prospective Juror Stinnett for Cause

Respondent contends that this claim is barred from federal habeas review because it was never raised in state court. Williams argues, however, that this is Williams' first opportunity to present this claim because both the Commonwealth and Juror Stinnett withheld vital information on voir dire. Specifically, Juror Stinnett failed to reveal her former marriage to a prosecution witness, Deputy Sheriff Claude B. Meinhard who investigated the Keller murders; and the prosecutor failed to disclose that he had represented Deputy Sheriff Meinhard during his divorce proceedings.

Although the Court is troubled by these allegations, Williams has failed to demonstrate how defense counsel was deficient in failing to challenge Juror Stinnett for cause. Williams himself states that "[if counsel were aware to [sic] Stinnett's relationship to trial witness Meinhard, failed to reveal the relationship to Williams or to the court, and failed to move to strike Stinnett for cause, then counsel were ineffective under Strickland and Williams was prejudiced." Pet'r Opp'n at 52 (emphasis added). Williams, however, has presented no evidence to establish that defense counsel actually knew of

Juror Stinnett's former marriage to Deputy Sheriff Meinhard. Accordingly, the Court finds no basis for holding that defense counsel were ineffective in not questioning Juror Stinnettt about matters of which counsel were completely unaware.

c. Failure to Conduct Extensive Voir Dire on the Issue of Pretrial Publicity

The Constitution guarantees criminal defendants a jury consisting of "impartial, indifferent" persons. Murphy v. Florida, 421 U.S. 794, 799 (1975) (citation omitted). In this case, several local newspaper stories were published about Williams and his involvement in the Keller murders as well as the Prince Edward County murders in the months leading up to his trial. In light of this, Williams argues that defense counsel were constitutionally ineffective at voir dire by failing to determine whether individual jurors had been influenced by pretrial publicity to Williams' prejudice.

As a preliminary matter, the Court notes that defense counsel did move for a change of venue which the trial court denied. As to the voir dire process, the trial transcript reflects that the trial judge questioned all the prospective jurors as to their exposure to pretrial publicity. See, e.g., Tr. 1-3-94 at 56-57, 75-76. In those instances where a

prospective juror had been exposed to pretrial publicity, the trial judge pursued the issue of prejudice.

> Has any of you formed any opinion as to the guilt or innocence by virtue of what you have heard or read?
> . . . .
> Considering what you have read about this case, do you believe that you can enter the jury box with an open mind and wait until the entire case is presented before you reach any fixed opinion or conclusion concerning the guilt or innocence of the accused?

Tr. 1-3-94 at 57. The trial judge then followed up his questions concerning exposure to pretrial publicity with questions concerning preconceptions about Williams' guilt. The judge also inquired about prejudice against both Williams and the Commonwealth. Finally, the judge gave defense counsel an opportunity to examine the prospective jurors. Contrary to Williams' assertion, defense counsel did pursue those prospective jurors who had admitted to being exposed to pretrial publicity. See, e.g., Tr. 1-3-94 at 67-68, 85-86.

Given that the trial court had already reached "the heart of the issue with respect to pre-trial exposure to publicity--that is, whether the [prospective jurors] had developed a fixed pre-

conception,"[21] the Court finds that defense counsel's tactical decision to not conduct a more detailed voir dire did not prejudice Williams' rights in this regard. Accordingly, Williams has failed to satisfy both prongs of the Strickland test.

Claim V(A)(6)

Prior to trial, Williams moved for the appointment of a private investigator to assist in investigating issues of mitigation evidence and a possible change of venue; the trial court denied the motion. On appeal, Williams argued that investigative assistance was required to investigate (1) Cruse's credibility and (2) the evidence of the Prince Edward County murders. Because these arguments were not presented to the trial court, the Virginia Supreme Court refused to consider the claim. See Williams, 248 Va. at 539. Williams now claims ineffective assistance of counsel on those grounds.

The Virginia Supreme Court has repeatedly held that an indigent capital defendant is not constitutionally entitled to the appointment of a private investigator. See, e.g., Gray v. Commonwealth, 233 Va. 313, 330 (1987); Watkins v. Commonwealth, 229 Va. 469, 478 (1985), cert. denied, 475 U.S. 1099 (1986). An

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[21] Clanton v. Blair, 619 F. Supp. 1491, 1501 (E.D. Va. 1985) (Merhige, J.).

indigent capital defendant is, however, entitled to be provided with "the basic tools of an adequate defense." Ake v. Oklahoma, 470 U.S. 68, 77 (1985). This could include non-psychiatric experts if the defendant is able to make "a particularized showing of need for the assistance of such experts." Husske v. Commonwealth, 252 Va. 203, 211 (1996), cert. denied, 117 S. Ct. 1092 (1997).

In the instant case, Williams asserts that the discovery of a September 1993 psychological report on Cruse[22] is a prime example of information that would have been beneficial to Williams' defense, but that could not be discovered without an investigator. In the report, the consulting psychiatrist notes that Cruse has "little recollection of the event, other than vague memories[]"--information which would have been beneficial in challenging Cruse's trial testimony. Pet'r Ex. D. Respondent argues, however, that Williams is precluded by 28 U.S.C. § 2254(e)(2) from introducing this report in support of his federal habeas petition because it was never presented to the state

[22] Williams claims that the Commonwealth failed to disclose this report, which contained valuable Brady information, to defense counsel. See infra Claim IV(A)(2).

courts in support of his state habeas petition.[23]

Although section 2254(e)(2) does not apply when a petitioner is denied the opportunity to develop a record in the state proceeding, Williams fails to explain to the Court how the report came to the attention of federal habeas counsel and why it could not have been previously discovered through the exercise of due diligence on the part of state habeas counsel. Williams has apparently been afforded the same type of assistance at both state and federal habeas--namely, court-appointed attorneys. The Court can therefore discern no reason and has been offered no explanation why state habeas counsel failed to discover the report and present it in state habeas proceedings. In light of this, Williams has failed to bear his burden of demonstrating that defense counsel were ineffective in failing to secure the appointment of an investigator, much less that there is a

[23] The applicable section of the statute provides that "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows" and then provides limited exceptions. 28 U.S.C. § 2254(e)(2). Williams argues, however, that he did not "fail" to develop a factual basis in state proceedings; he was denied the tools necessary to do so by the Virginia Supreme Court. Section 2254(e)(2) does not apply when a petitioner attempts to develop a record in the state proceeding, but is denied that opportunity by the state court. See Cardwell v. Netherland, 971 F. Supp. 997 (E.D. Va. 1997).

reasonable probability that the outcome of his trial would have been different.

Claim V(A)(7)

During the guilt phase, the Commonwealth presented the testimony of Mrs. Keller's mother and Mr. Keller's brother as a means of identifying the personal property taken from the Kellers' home. Prior to their testimony, defense counsel were apparently prepared to stipulate to the evidence. Williams argues that by failing to promptly do so, defense counsel allowed "unnecessarily emotional and inflammatory testimony" to be presented to the jury, thereby prejudicing his case. The Court finds, however, that Williams has failed to show that the stipulation, if accepted, would probably have changed the outcome of the trial. Accordingly, pursuant to Strickland, this claim must be dismissed.

Claims V(A)(8) & V(A)(9)

During the prosecution's arguments, defense counsel did not offer a single objection despite numerous instances in which the prosecutor allegedly misstated the evidence, interjected opinion, mischaracterized testimony, argued facts not in evidence, and made other improper arguments. Williams claims that he was, in effect, without counsel during opening and closing arguments;

thus, so he contends, defense counsel's performance was unconstitutionally deficient and he was prejudiced as a result.

Defense counsel state in their affidavit, however, that

> [a]s a matter of general strategy, we believe it is better not to object to a prosecutor's remarks or arguments to the jury unless absolutely necessary. Such objections run the risk of emphasizing adverse matters before the jury or giving the jury the impression the defense is trying to cover something up. In Michael Williams' case, we refrained from making such objections because, in our opinion, any such objections would have been overruled by the trial judge and the objections could have adversely affected our client in the jury's eyes.

Resp't Federal Ex. D at 4. Such a strategy appears reasonable and accordingly, did not render Williams' defense counsel constitutionally ineffective. Moreover, Williams has failed to show a reasonable probability that the outcome of either phase of the proceedings would have been different if defense counsel had made any or all of Williams' suggested objections.

Claim V(B)(1)

At the outset of the penalty phase, the Commonwealth called the mother of Mrs. Keller as a witness. Williams argues that her appearance was totally irrelevant and indeed, was "designed to elicit the juror's sympathy and arouse their anger against Williams." Pet'r Opp'n at 56. As a consequence, Williams claims

that defense counsel should have objected to her testimony and their failure to do so constitutes ineffective assistance of counsel.

On direct appeal, the Virginia Supreme Court assessed the testimony of Mrs. Keller's mother as follows: "[she] testified only as to her daughter's age and marriage to Mr. Keller and identified a photograph of the Kellers [as they appeared before their deaths]. The record does not disclose that [she] displayed any particular emotion during the short period of her testimony." Williams, 248 Va. at 548. Our review of the record concurs with this assessment.

The Court also agrees, however, with Williams' argument that the prosecutor could have argued the statutory aggravators based on previously admitted crime scene photographs which sufficiently depicted the vileness of the crime. Williams has not proferred any evidence, however, to establish that defense counsel's decision not to object on relevancy grounds was not a tactical decision. Moreover, Williams has failed to suggest any concrete evidence of prejudice as a result of his counsel's alleged deficient conduct. Accordingly, this claim must be dismissed.

Claim V(B)(2)

Williams argues that his defense counsel were ineffective in

failing to timely object to photographs of the Prince Edward County victims and to properly argue the objection. The issue of the photographs arose during the Commonwealth's examination of the medical examiner, Dr. William Massello. Dr. Massello had been called to identify the four victims of the Prince Edward County shootings and to establish their cause of death. In addition to the autopsy reports, the Commonwealth sought to introduce photographs of each victim's head[24] in order to establish "vileness." Defense counsel immediately objected and engaged in heated argument in the presence of the jury. The trial court finally admitted the photographs, but only after the Commonwealth changed the grounds for which they were offered --to establish "future dangerousness" and to corroborate the testimony of Williams' brother about the shootings. On direct appeal, the Virginia Supreme Court ruled that the photographs were properly admitted and rejected Williams' argument that the photographs need not be admitted because the same facts were contained in the autopsy reports.

Williams now argues that defense counsel were ineffective in

[24] The photographs graphically demonstrated that each victim had been shot in the head and that parts of each head had been subsequently burned. Williams, 248 Va. at 547.

failing to "foresee the inflammatory and prejudicial effect the Prince Edward photographs would have on the jurors and fail[ing] to object to their admission in advance of the medical examiner's testimony." Pet'r Opp'n at 57. The unrebutted affidavit submitted by defense counsel refuts this contention. See Resp't Federal Ex. D at 6. Moreover, as Respondent correctly notes, defense counsel did raise their objection to the photographs in a manner that was timely and specific enough to have the issue decided on appeal.

Even assuming that defense counsel's performance was deficient in failing to preempt the issue before it reached the jury, Williams has not shown that there is a reasonable probability that the outcome of the penalty phase would have been different if counsel had succeeded in keeping the photographs out--the autopsy reports which explicitly described the wounds of the Prince Edward County victims were already before the jury. Nor has Williams demonstrated that raising the objection outside the presence of the jury would probably have changed the ultimate sentence. For these reasons, this claim must be dismissed under Strickland.

Claim V(B)(3)

In addition to failing to prevent the admission of the

Prince Edward County photographs, Williams claims his defense counsel were ineffective on the grounds that they did not attempt to develop defense evidence and mitigating information through the medical examiner's testimony. Williams' brother, John, had testified that he, Williams, and the Prince Edward County victims had been drinking heavily on the night of the shootings. Williams now argues that defense counsel should have attempted to posit an explanation for the shootings by cross-examining Dr. Massello--specifically, that a drunken Williams had acted out of provocation or self-defense when threatened by an equally intoxicated man with a gun. Respondent argues, however, that defense counsel made "a deliberate, tactical decision not to cross-examine Dr. Massello" which should not be second-guessed on habeas review. Resp't Mot. to Dismiss at 50-51.

The affidavit submitted by defense counsel in the state habeas proceeding confirms Respondent's contention:

> We were thoroughly prepared for Dr. Massello's testimony at the penalty stage regarding the autopsies of the four Prince Edward County victims. We had reviewed all of the autopsy reports and Dr. Massello's testimony was consistent with those reports. We decided, as a matter of trial strategy, not to cross-examine Dr. Massello. Our strategy was to get Dr. Massello off the witness stand as quickly as possible. We did not want to ask him any questions which might

> result either in his using the photographs of the victims to illustrate his response or in the prosecution's using the photographs again on redirect. The photographs were very damaging to the defense and we simply did not want to run the risk of making a bad situation worse.

Resp't Federal Ex. D at 5-6.

Furthermore, there is no evidence that Williams was prejudiced by defense counsel's failure to cross-examine Dr. Massello and elicit information on levels of intoxication and time of death. In fact, a review of the trial transcript shows that Williams' proposed justification for shooting the Prince Edward County victims would not have been borne out by the evidence. Dr. Massello testified that Villalobos, the victim who allegedly provoked Williams, was shot "to the back of the right side of the head. . . . And as opposed to being a round hole, that you would expect a bullet to make, this is a very ragged, sort of star-shaped appearing wound, and this is from the effects of the muzzle of the gun being held in contact with the head at the time of discharge . . . ." Tr. 1-6-94 at 109, 112-13 (emphasis added). The other victims were also shot at fairly close range. See, e.g., Tr. 1-6-94 at 128. In the face of evidence which clearly contradicts Williams' self-defense argument, the Court finds that Williams was not prejudiced by

defense counsel's decision to not call further attention to Dr. Massello's damaging testimony.

Claim V(B)(4)

Williams also claims ineffective assistance of counsel with respect to defense counsel's failure to cross-examine his brother, John. Although John testified that he had passed out prior to the shootings and thus did not know anything about the shootings other than what his brother had confessed to him, Williams argues that defense counsel could have elicited favorable evidence relating to the issue of self-defense. Furthermore, Williams claims that defense counsel could and should have humanized him by questioning John as to Williams' concern for John on the night of the shooting, Williams' remorse over the shooting of one of the victims, and John's own willingness to help his brother.

Again, the affidavit demonstrates that defense counsel made a deliberate, tactical decision not to cross-examine John.

> [H]is testimony regarding what the defendant had told him about the Prince Edward homicides was a more favorable version of the event than what the defendant had told us. Johnny was a reluctant prosecution witness and it was our impression that the prosecution had not succeeded on direct examination in eliciting from him all the information it had hoped to elicit. . . .

> (W)e did not want to risk inadvertently eliciting such adverse information on cross-examination or giving the prosecution another chance to do so on redirect.

Resp't Federal Ex. D at 6. Absent evidence to the contrary, the Court does not find that defense counsel acted unreasonably. Under Strickland, this claim must be dismissed.

Claim V(B)(5)

Williams claims that defense counsel were ineffective for failing to object when the prosecutor cross-examined Williams' mother and maternal grandfather about the events leading to Williams' arrest. On direct examination, defense counsel had questioned Williams' mother about family history and Williams' learning disabilities, drug abuse, and other problems; Williams' grandfather was called to testify about Williams' strong work ethic and positive relationships with family members. On cross-examination, however, the prosecutor focused exclusively on Williams' arrest and the role of Williams' mother in persuading her son to surrender--topics clearly beyond the scope of direct examination. Defense counsel then failed to conduct any redirect examination to rehabilitate these mitigation witnesses.

In their affidavit, defense counsel state that it would have been futile to object: "such an objection certainly would have

been overruled on the grounds that the Commonwealth was entitled to cross-examine the witnesses on the issue of bias." Resp't Federal Ex. D at 6. The Court agrees with Williams, however, that "effective representation requires that counsel make appropriate objections to limit harmful evidence at trial and to preserve that issue for further appellate review." Pet'r Opp'n at 60. Counsel's prediction that their objection might be overruled by the trial court does not excuse their failure to object to obviously improper cross-examination.

As arguably deficient as defense counsel's performance may have been in this regard, however, Williams has not alluded to any prejudice whatever arising from defense counsel's omission. There is no evidence that the outcome of the penalty phase would probably have been different had defense counsel objected. Williams has thus failed to meet the "prejudice" prong of the Strickland test, and the instant claim must be dismissed.

Claim V(B)(6)

Williams argues that defense counsel were ineffective in failing to present evidence of his drug and alcohol abuse as a mitigating factor during the sentencing phase. Evidence at the guilt phase established that Williams had been drinking heavily on the night of the Keller murders and the Prince Edward County

shootings. Evidence at the penalty phase further established that Williams had an extensive history of drug and alcohol abuse. Defense counsel did not, however, argue Williams' state of mind, the effect of Williams' drug and alcohol intoxication at the time of both the Keller and Prince Edward County murders, or the effect of drug and alcohol use on Williams who suffers from Attention Deficit and Hyperactivity Disorder ("ADHD"). Once again, defense counsel's affidavit provides an explanation for this alleged deficiency.

Defense counsel assert that "[i]t was our strategy not to assert [Williams'] intoxication at the time of the crimes as an excuse for his actions, but rather as part of a continuing symptom of his overall disorder." Resp't Federal Ex. D at 5. A review of the record confirms that defense counsel pursued this strategy throughout the penalty phase. Through the testimony of Dr. Dewey Cornell, the clinical psychologist appointed to assist the defense, defense counsel established that Williams suffered from ADHD and elicited information on the negative effects that drug and alcohol abuse have on a person with ADHD. Defense counsel also called members of Williams' family to testify about Williams' learning disabilities and continuing drug addiction. And contrary to Williams' assertion, defense counsel did argue

Williams' intoxication at the time of the Keller and Prince Edward County murders on summation, albeit not in as much detail as Williams would have liked. Given the fact that it is "common knowledge that many find it difficult to view the illegal use of narcotics under any circumstances as a mitigating factor,"[25] the Court cannot say that counsel's performance was unreasonable.

Although it is tempting to opine in hindsight what defense counsel could and should have done at the sentencing phase, that is not the province of this Court. It is Williams' burden to demonstrate both deficient performance and prejudice from defense counsel's alleged mishandling of the issue of his drug and alcohol intoxication. Williams has not done so and thus, the claim must be dismissed.

Claim V(B)(7)

Williams next argues that defense counsel failed to protect the testimony of his mitigation expert, Dr. Cornell, from numerous objections and interruptions by both the prosecutor and the trial court. Other than the conclusory allegation that "[c]ounsel was wholly ineffective in addressing these issues," however, Williams has not provided any concrete evidence of

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[25] Woomer v. Aiken, 856 F.2d 677, 684 (4th Cir. 1988), cert. denied, 489 U.S. 1091 (1989).

deficient performance. On the contrary, the trial transcript clearly shows that defense counsel did respond, often times vigorously, to the prosecutor's attempts to limit Dr. Cornell's testimony. Defense counsel also challenged the trial court when it sought to advance the mitigation presentation. In light of this, the Court finds that Williams has failed to overcome the strong presumption that defense counsel's performance in presenting Dr. Cornell's testimony fell within the wide range of professionally competent performance. Moreover, Williams offers nothing more than mere speculation as to the prejudicial effect of defense counsel's conduct on his case. Under Strickland, more is required; this claim therefore fails.

Claim V(B)(8)

Williams claims ineffective assistance of counsel based on defense counsel's failure to request an evaluation of Williams by a neuropsychologist to determine whether he suffered from brain dysfunction. In the state habeas proceeding, Williams submitted the affidavit of a neuropsychologist, Dr. Robert Hart, who, after reviewing the testimony and evidence presented at trial, concluded that there was an indication of possible brain dysfunction which clearly required a thorough neuropsychological examination. Williams now contends that defense counsel's

failure to pursue such an examination constitutes deficient performance and prejudiced his case.

Defense counsel responds, however, that they thoroughly consulted with Dr. Cornell, their mitigation expert who was familiar with the field of neuropsychology, and specifically discussed the possibility of organic brain dysfunction. Specifically, defense counsel state in their affidavit that:

> Dr. Cornell never indicated to us that further testing or evaluation was necessary or advisable. We specifically discussed with Dr. Cornell whether Michael Williams had organic brain damage because we were aware, and Dr. Cornell was aware, that at the time of Michael's birth there had been complications which reportedly had resulted in Michael not breathing for a period of time. Dr. Cornell, however, informed us that he had performed his own tests, including several standard neuropsychological tests, and satisfied himself that no further testing was indicated.
>
> . . . If Dr. Cornell had informed us that further evaluation was necessary or advisable, we would have requested the trial judge to authorize such an evaluation.

Resp't Federal Ex. D at 7-8.

Regardless of whether Williams believes that Dr. Cornell's neuropsychological assessment was inadequate, Williams has failed to prove that defense counsel's conduct was so objectively unreasonable as to constitute deficient performance. See, e.g.,

Pruett v. Thompson, 996 F.2d 1560, 1573-74 (4th Cir.), cert. denied, 510 U.S. 984 (1993). Defense counsel asked other members of the criminal defense bar to recommend a mitigation expert who would begin an evaluation on Williams' side; provided Dr. Cornell with all of the relevant information concerning the crimes and Williams' life history; and consulted with Dr. Cornell on numerous occasions prior to trial. Based on the foregoing, the Court finds that Williams received effective assistance of counsel within the meaning of Strickland.

Claim V(B)(9)

During the penalty phase, defense counsel elected not to put Williams on the stand. Williams now claims that had he testified, defense counsel could have elicited beneficial mitigation and rebuttal evidence which would have provided the jury with a reason for imposing a life sentence. Williams asserts that this failure to present his testimony demonstrates the absence of any defense strategy because "there was simply no advantage to a decision to withhold his testimony at the sentencing phase given the magnitude of the crimes involved." Pet'r Opp'n at 65.

Defense counsel's affidavit belies this contention. The record reveals that defense counsel discussed the issue of

testifying with Williams several times before trial, mid-trial, and the night before he testified at the guilt stage. Counsel repeatedly advised Williams of all the benefits and risks involved in testifying, and informed Williams that the ultimate decision was his to make. Only after viewing Williams' performance on the witness stand at the guilt stage--in particular, his "very cold" demeanor--did defense counsel decide not to call him during the penalty phase and risk subjecting him to damaging cross-examination about the Prince Edward County shootings. See Resp't Federal Ex. D at 9. Under these circumstances, the Court is hard-pressed to find how defense counsel's performance could be deemed ineffective.

Claim V(B)(10)

At the conclusion of the penalty phase, the trial court failed to instruct the jury as to the nature and use of the mitigation evidence presented by Williams. Williams now claims that defense counsel's failure to object to the allegedly deficient jury instructions and to request a corrective mitigation instruction deprived him of effective assistance of counsel. As discussed previously with respect to Claim VII(A), however, the Fourth Circuit has routinely held that penalty stage instructions beyond the standard Virginia sentencing instruction

are not constitutionally required, particularly on the issue of mitigation. See, e.g., Buchanan v. Angelone, 103 F.3d 344, 347-48 (4th Cir. 1996) (holding that "Virginia's death penalty scheme survives constitutional scrutiny, despite its 'failure to instruct the jury on statutory mitigating factors'") (citation omitted); Jones v. Murray, 947 F.2d 1106, 1119-20 (4th Cir. 1991), cert. denied, 503 U.S. 973 (1992); Clozza v. Murray, 913 F.2d 1092, 1005 (4th Cir. 1990), cert. denied, 499 U.S. 913 (1991). Thus, defense counsel's conduct cannot be said to be deficient in this regard.

Claim V(B)(11)

For the reasons stated above with respect to Claims V(A)(8) and V(A)(9), this claim is likewise dismissed under Strickland.

Claim V(B)(12)

Williams claims that defense counsel presented ineffective argument at the penalty phase and failed to provide the jury with persuasive reasons to impose a sentence of life rather than death. Contrary to Respondent's assertion, Williams does specify those mitigating factors that defense counsel did not argue or argued ineffectively as well as those arguments that harmed Williams' case. See Pet. at 145-46. After reviewing the trial transcript, however, the Court does not find that defense

counsel's argument was so lacking as to fall below the wide range of professionally competent performance.

In closing argument, counsel did discuss Williams' history of drug and alcohol abuse; traumatic events in his life, including sexual abuse and an unstable home; ADHD and its effect on Williams; his loving and close relationship with his family; and his intoxication on the night of the Keller murders and Prince Edward County shootings. Counsel also stressed that the jury had the option of imposing a life sentence regardless if they found either of the statutory aggravating factors and that there was enough hope for Williams that the jury should impose a life sentence. See Tr. 1-7-94 at 208-212, 215-24. Absent post hoc rationalization, the Court cannot say that defense counsel's conduct was objectively unreasonable under Strickland.

Claim V(B)(13)

As a final matter, Williams claims that defense counsel's errors at the sentencing phase individually and collectively prejudiced his case. Aggregating alleged errors that themselves do not constitute ineffective assistance is not sufficient to meet the stringent standard under Strickland. See Thomas-Bey v. Smith, 869 F. Supp. 1214, 1230-31 (1994), aff'd, 67 F.3d 296 (4th Cir. 1995). Accordingly, this claim must be dismissed.

Claim V(C)(1)[26]

Williams claims that defense counsel, who were also appellate counsel, rendered ineffective assistance by failing to properly appeal the denial of proposed Instructions #19 and #20 to the Virginia Supreme Court. See infra Claim V(A)(1). Specifically, because appellate counsel merely "'incorporate[d] by reference' the argument he made in the trial court," the Virginia Supreme Court refused to consider the claim on appeal. Williams, 248 Va. at 545. Williams argues that this omission of "an obviously winning issue" constitutes ineffective assistance of counsel on appeal. Pet. at 148.

As discussed previously with respect to Claim V(A)(1), however, assuming arguendo that counsel's performance was deficient in this regard, Williams must still demonstrate prejudice. Although the Court agrees that Williams is not required to demonstrate that the omitted claim would have resulted in a reversal on appeal, Williams must demonstrate that there is a reasonable probability that the outcome of the appeal would have been different. Given the Virginia Supreme Court's

[26] Respondent concedes that Claim V(C)(1) was raised in Williams' state habeas petition and dismissed by the Virginia Supreme Court on the grounds that it was without merit. See Resp't Reply at 26.

determination that the trial court's Instruction #18 was a correct statement of Virginia law, counsel's failure to properly appeal the issue would not have changed the outcome. Thus, the Court finds that Williams was not denied effective assistance of appellate counsel.

Claim V(C)(2)[27]

Williams next argues that counsel failed to properly preserve objections or properly frame its appeal of the trial court's erroneous restrictions of voir dire. Rather than specifically appeal the trial court's restrictions on questions concerning juror attitudes about the death penalty, counsel appealed the trial court's general denial of expanded voir dire. Williams argues that the failure to properly frame the issue under applicable U.S. Supreme Court precedent constituted ineffective assistance of counsel. Assuming arguendo that counsel was deficient in this regard, Williams has not demonstrated that there is a reasonable probability that the direct appeal decision would have come out any differently had counsel appealed the issue with more specificity. Accordingly,

[27] Respondent concedes that Claim V(C)(2) was raised in Williams' state habeas petition and dismissed by the Virginia Supreme Court on the grounds that it was without merit. See Resp't Reply at 26.

this claim must be dismissed.

Claim V(C)(3)

Williams' final claim is that appellate counsel failed to properly appeal the trial court's refusal to strike Juror Davis. At trial, defense counsel objected to Juror Davis on the ground that he strongly favored the death penalty. On direct appeal, however, appellate counsel proposed a different argument--namely, that the trial court applied the wrong disqualification standards. Noting that the latter objection was not made in the trial court, the Virginia Supreme Court dismissed the claim pursuant to its Rule 5:25. See Williams, 248 Va. at 540.

Whether appellate counsel should have narrowly tailored the appeal regarding juror exclusion to the treatment of each individual juror, the Court is not persuaded that counsel's failure to do so does falls outside the wide range of objectively reasonable performance. Given that Williams has alleged that the trial court treated Jurors Trent, Holman, Bernard, and Davis differently, it is not unreasonable for appellate counsel to have framed the appeal in such terms as would encompass the trial court's allegedly erroneous treatment of all these jurors.

The Court also notes that the state trial judge found Juror Davis to be impartial; this Court is required to give deference

to that finding of fact. See § 2254(e)(1). In the absence of clear and convincing evidence to rebut the trial court's finding that Juror Davis could impartially consider imposing a life or death sentence, the Court finds that Williams has failed to establish prejudice resulting from appellate counsel's failure to litigate this specific claim on appeal. Under Strickland, this claim must be dismissed.

VII. CONCLUSION

Respondent's Motion to Dismiss the petition will be GRANTED IN PART AND DENIED IN PART. An Evidentiary Hearing will be GRANTED with respect to Claims I(A), IV(A)(1), and IV(A)(5).

/s/
UNITED STATES DISTRICT JUDGE

DATE: April 13, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
OCT 31 1996
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

MICHAEL WAYNE WILLIAMS,
Petitioner,

v.

J. D. NETHERLAND, Warden,
Mecklenburg Correctional Center,
Respondent.

Civil Action No.
3:96CV529

ORDER

Petitioner, through counsel, appeared before the Court after notice to the Respondent for purposes of demonstrating a need for confidentiality by reason of having requested services pursuant to 21 U.S.C. § 848(q)(9), and the Court directed an adversarial hearing wherein the Court expressed the view that it would be necessary for Petitioner to list his alleged claims to the end that the Court be advised by Respondent of any which allegedly have been defaulted to which action Petitioner objected, but did, however, at the Court's request, file a list of his intended claims, which the Court has refrained from looking at and sealed until such time as the United States Court of Appeals for the Fourth Circuit renders a decision as to whether said listed claims may be shown to Respondent as this Court deems necessary.

Let the Clerk send copies of this Order to all counsel of record.

UNITED STATES DISTRICT JUDGE

Date OCT 31 1996

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
OCT - 7 1996
CLERK, U.S. DISTRICT COURT

MICHAEL WAYNE WILLIAMS,
Petitioner,

v.

J.D. NETHERLAND, Warden,
Respondent.

Civil Action
No. 3:96cv529

ORDER

The Court is in receipt of the respondent's motion opposing petitioner's request to proceed ex parte under 21 U.S.C. § 848(q)(9). Deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED, that the Court grants respondent's motion for an adversarial hearing for the limited purpose of assessing petitioner's need for confidentiality.

Petitioner's counsel is requested to arrange a conference call with respondent's counsel so that an appropriate hearing date may be set.

Let the Clerk send copies of this Order to counsel of record.

UNITED STATES DISTRICT JUDGE

October 7, 1996
DATE

24

FILED
SEP 18 1996
CLERK, U.S. DISTRICT COURT
RICHMOND VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

J.D. NETHERLAND, Warden,

Respondent.

Civil Action
No. 3:96cv529

ORDER

The Court is in receipt of the respondent's letter requesting an adversarial hearing on petitioner's ex parte requests under 21 U.S.C. § 848(q)(9). Deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED, that the Court's earlier Orders granting petitioner permission to proceed ex parte and under seal are hereby STAYED until the further Order of this Court.

Let the Clerk send copies of this Order to counsel of record.

UNITED STATES DISTRICT JUDGE

Sept. 18, 1996
DATE

21

FILED
SEP - 5 1996
CLERK, U.S. DISTRICT COURT
RICHMOND VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

J. D. NETHERLAND, WARDEN
MECKLENBURG CORRECTION CENTER,

Respondent.

Civil Action No. 3:96CV529

UNDER SEAL

ORDER

This matter is before the Court on Petitioner's Motion for Leave to Proceed Ex Parte and Under Seal. Good cause and the need for confidentiality having been shown, it is hereby

ORDERED that Petitioner may proceed ex parte for purposes of requesting the assistance of experts under 21 U.S.C. §§ 848(q)(9); and it is further

ORDERED that all motions, supporting memoranda, and court orders relating to Petitioner's request for the assistance of experts shall be placed under seal.

It is so ORDERED.

UNITED STATES DISTRICT JUDGE

September 2, 1996

18

FILED
SEP - 3 1996
CLERK, U.S. DISTRICT COURT
RICHMOND VA

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 18th day of March, 1996.

Michael Wayne Williams, Petitioner,

against Record No. 951589

Warden of the Mecklenburg Correctional Center, Respondent.

Upon a Petition for a Writ of Habeas Corpus

Applying the rule in Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970), to petitioner's allegations I(A), I(B), I(C), I(D), I(E), I(F), I(G), I(H), I(J), I(K), III(C), III(H)(2), III(J), III(L), III(M) and III(U); the rule in Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), to petitioner's allegations I(H) (to the extent petitioner relies on the prosecutor's closing arguments), I(I), I(J) (to the extent petitioner relies on gender and economic status), I(K) (to the extent petitioner relies on the length of time he will spend on death row), III(A)(1), III(A)(2), III(B), III(E), III(F), III(G), III(H)(1), III(I), III(K), III(N), III(O), III(P), III(Q), III(R), III(S), III(T), IV(A), IV(B), IV(D), IV(E), V(A); and finding no merit in petitioner's remaining allegations, the Court is of opinion that the writ of habeas corpus should not issue as prayed for. On further consideration whereof, petitioner's motion for expert services, motion for production of Jeffrey Allen Cruse and discovery relating to Jeffrey Allen Cruse are denied. It

is therefore ordered that the said petition be dismissed and the rule be discharged. Chief Justice Carrico took no part in the consideration of this case.

A Copy,

Teste:

David B. Beach, Clerk

By: Patricia A. Kenegar
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 13th *day of* January, 1995.

Michael Wayne Williams, Appellant,

against Record No. 940445
Circuit Court No. F-143

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 4th day of November, 1994 and grant a rehearing thereof, the prayer of the said petition is denied.

Chief Justice Carrico took no part in the consideration or decision in this case.

A Copy,

Teste:

Clerk

nsel's continuing objection, de- tems stolen as two 13–inch color ts "with just normal tuners, all that were "a year, two years in "good working order." Nei- that he had not purchased the company but that he had "used as "familiar" with them. When e prosecutor, "All right, sir, in , had you wanted to sell those ts for their fair market value on y were stolen, what would be—," nsel interrupted and objected. n was overruled, and the prose- ed with, "What would you have ose television sets, each, on the eft?" The witness answered, "I hundred and fifty dollars."

tated that he had never sold a t nor had he "looked at the clas- or the sale of televisions." He it he did not "personally" buy ment" for the company but that rders for equipment and was fa- equipment value "to a degree" amination of catalogs.

rther stated that in his "normal a citizen," he had purchased tele- nd that he owned a set that was a 13–inch model. The witness at when he "was looking to buy a t," he "priced" them and that he perience as a manager for the nd his "personal experience" into n when relating the stolen items' ally, when Neiman was asked if y about value "was a guess," he 'That's the value I would place on

rney General argues that the peals correctly ruled there was idence to support the jury's find- stolen property had a value of more. We disagree.

enerally, the opinion testimony of f personal property is competent ble on the question of the value of rty, regardless of the owner's of property values. *Haynes* v. Va. 746, 750, 91 S.E.2d 433, 436

1956). But Neiman was not the owner of the televisions, only an employee of the corporation that owned them. Ownership of property by a corporation does not automatically qualify a company employee to testify about the value of company property. *Jones v. State*, 408 So.2d 690, 691 (Fla.Dist.Ct.App. 1982) (employee of hotel who was night clerk on duty when television set stolen lacked requisite knowledge regarding the property and its value).

[4] However, the general rule is that opinion testimony of a nonexpert, who is not the owner of the personal property in question, is admissible upon the subject of property value, provided the witness possesses sufficient knowledge of the value of the property or has had ample opportunity for forming a correct opinion as to value. *Haynes*, 197 Va. at 750, 91 S.E.2d at 436; *Kerr v. Clinchfield Coal Corp.*, 169 Va. 149, 155–56, 192 S.E. 741, 743 (1937). *See Veney v. Commonwealth*, 212 Va. 805, 806–07, 188 S.E.2d 80, 81–82 (1972); *Hicks v. Commonwealth*, 157 Va. 939, 944, 161 S.E. 919, 920–21 (1932); *Wadley v. Commonwealth*, 98 Va. 803, 806–08, 35 S.E. 452, 453–54 (1900); *Norfolk & Western Ry. Co. v. Reeves*, 97 Va. 284, 288–90, 33 S.E. 606, 607 (1899). *See generally* 3 *Wigmore on Evidence* § 716(2) (Chadbourn Rev. 1970).

[5] Applying the general rule, we hold the evidence of value presented in this case was inadequate as a matter of law to establish that element of the crime beyond a reasonable doubt. Neiman demonstrated insufficient knowledge of the value of the stolen items. Moreover, he lacked ample opportunity for forming an accurate opinion on value. In sum, his testimony upon fair market value of the television sets was wholly without foundation, thus resulting in a failure of the Commonwealth's proof.

Employed by the cable television company as production manager for "just over a month," Neiman described the items, stated their age, and said they were in "good working order." But he did not testify about the original cost or "the effect of age and wear and tear" on the value of the stolen equipment. *Dunn v. Commonwealth*, 222 Va. 704, 705, 284 S.E.2d 792, 792 (1981) (original pur- ce of stolen item admissible in grand larceny prosecution, but due allowance for elements of depreciation necessary to establish current value). Neiman, who did not personally buy equipment for his employer, merely based his estimate of fair market value on "personal experience" as a consumer and "experience as a manager for the company," neither of which afforded him a basis for giving a competent opinion of value.

Accordingly, the order of the Court of Appeals will be reversed and the judgment of conviction will be vacated. The case will be remanded to the Court of Appeals with direction that it be remanded to the circuit court for a new trial upon a charge of petit larceny.

Reversed and remanded.

Michael Wayne WILLIAMS

v.

COMMONWEALTH of Virginia.

Record No. 940445.

Supreme Court of Virginia.

Nov. 4, 1994.

Defendant was convicted by the Circuit Court of Cumberland County, John R. Snoddy, Jr., J., of two capital murders, rape, burglary, and arson, and he appealed his capital murder convictions. The Supreme Court, Whiting, J., held that: (1) defendant had no constitutional right to bill of particulars on vileness predicate for death penalty based on indictments that were sufficient to give him notice of nature and character of offenses charged; (2) trial court did not abuse its discretion in denying defendant's motion for change of venue; (3) trial court did not commit manifest error in excusing prospective juror who testified that she

would automatically refuse to impose death penalty because of her religious beliefs; (4) trial court did not abuse its discretion in refusing to declare mistrial after prosecution witness made reference to defendant's involvement in four other uncharged murders; (5) trial court did not abuse its discretion in admitting six photographs of victims' bodies at scene of their murders; (6) trial court did not abuse its discretion by allowing accomplice to testify on direct examination that he had no plea agreement with Commonwealth in exchange for his testimony implicating defendant; (7) trial court properly refused to permit evidence that accomplice testifying for prosecution had been convicted of assault and battery as impermissible attack upon his credibility; (8) evidence was sufficient to support defendant's convictions for capital murder; (9) defendant was not put in double jeopardy by his convictions on five charges of capital murder when only two people had been killed, since only one death sentence was imposed for each victim; (10) review of sentencing hearing did not indicate that jury, in opposing death sentence, was influenced by passion, prejudice, or any other arbitrary factor; and (11) defendant's death sentences were not excessive or disproportionate to penalties imposed by other sentencing bodies in Commonwealth for similar conduct, considering both crimes and defendant.

Affirmed.

1. **Criminal Law** ⇐1035(5)

Defendant's objections to exclusion of prospective jurors would not be considered on appeal, where defendant did not object to their exclusion at trial.

2. **Criminal Law** ⇐1038.1(1), 1038.2

Defendant's objection to trial court's grant and refusal of certain penalty phase jury instructions would not be reviewed on appeal, where defendant did not object to these actions at trial.

3. **Indictment and Information** ⇐121.2(5)

Defendant had no right to bill of particulars requiring Commonwealth to identify every narrowing construction of vileness factor in death penalty statute on which it intended to offer evidence. Were indictments were sufficient to give him notice of nature and character of offenses charged. Code 1950, § 19.2-264.4, subd. C.

4. **Constitutional Law** ⇐268(2.1)

Due process does not require Commonwealth to limit itself to pretrial construction of character of defendant's conduct. U.S.C.A. Const.Amend. 5.

5. **Criminal Law** ⇐126(2)

Trial court did not abuse its discretion in denying defendant's motion for change of venue based on pretrial publicity, where there was no evidence that pretrial publicity was inaccurate or that it was difficult to empanel jury.

6. **Criminal Law** ⇐134(1)

Defendant seeking change of venue has burden of showing that there was widespread prejudice against him in county which would be reasonably certain to prevent fair trial. U.S.C.A. Const.Amend. 6.

7. **Criminal Law** ⇐121, 1150

Decision whether to grant change of venue is within sound discretion of trial court, and will not be disturbed on appeal absent abuse of discretion.

8. **Criminal Law** ⇐1031(1)

Defendant's motion for assistance of private investigator to investigate credibility of accomplice testimony and evidence of other crimes which would be considered in penalty phase on issue of defendant's future dangerousness, which was not raised at trial, would not be considered on appeal.

9. **Jury** ⇐131(8)

Defendant was not allowed to inject issues of parole in his voir dire examination, where he was not ineligible for parole when capital case was tried.

10. **Criminal Law** ⇐1035(5)

Defendant could not raise on appeal his claim that trial court applied wrong standard in refusing to disqualify prospective juror, where he failed to raise claim at trial.

iminal Law ⇐1035(5)

Trial court did not commit manifest error in excluding prospective juror who testified that she would automatically refuse to impose death penalty because of her religious beliefs and that she would not consider court's directions to consider death sentence as well as sentence of life imprisonment.

12. **Criminal Law** ⇐1166.17

Supreme Court will not reverse ruling on exclusion of prospective juror based on juror's views that would prevent or substantially impair performance of his or her duties as juror in accordance with trial judge's instructions and oath in absence of showing of manifest error.

13. **Criminal Law** ⇐867

Trial court did not abuse its discretion in refusing to declare mistrial based on witness' apparent reference to unadjudicated acts of murder and arson allegedly involving defendant, where defendant declined trial court's offer to instruct jury to disregard that testimony.

14. **Criminal Law** ⇐438(5.1)

Trial court did not abuse its discretion in admitting six photographs of victims' bodies at scene of their murders.

15. **Witnesses** ⇐318

Trial court did not abuse its discretion in allowing accomplice to testify on direct examination that he had no plea agreement with Commonwealth in exchange for his testimony, though accomplice's credibility had not been attacked, where defendant advised court that he planned to attack accomplice's credibility.

16. **Witnesses** ⇐318

Ordinarily, evidence of witness' credibility is not admissible until witness' credibility is attacked.

17. **Criminal Law** ⇐680(1), 1153(1)

Order of proof in trial is matter committed to sound discretion of trial court, and reviewing court will not reverse ruling varying order of proof in absence of abuse of discretion.

18. **W** **s** ⇐414(1)

Evidence that accomplice testifying against defendant was upset by pictures of murder scene was appropriate corroboration of his testimony that he wanted to get testimony off his chest, properly rebutting suggestion that he was testifying to get death penalty off his back.

19. **Witnesses** ⇐345(2)

Trial court properly refused to permit defendant to show that accomplice testifying against him had conviction for assault and battery, where accomplice admitted firing first shot at one of victims, eliminating any doubt of his proclivity for assaultive behavior for evidence to be admissible for purpose other than attacking accomplice's credibility.

20. **Criminal Law** ⇐339.7(1), 339.9(3)

Prosecution witness' identification of defendant as one of two men from whom she bought some of victims' property on day after they were murdered was admissible, though she could not initially identify defendant in courtroom, where she identified a photograph of him that had been shown to her shortly after she had bought some of the stolen property, and then later volunteered that she saw him in courtroom.

21. **Criminal Law** ⇐706(4)

Commonwealth did not engage in improper cross-examination of defendant by asking him whether he was only witness who had been present in courtroom and heard testimony of witnesses who had already testified, thereby allegedly impermissibly burdening his constitutional rights, where question merely reflected what jury already knew.

22. **Criminal Law** ⇐406(5)

Defendant's out-of-court statement to police officer transporting him from different state that he could prove that accomplice had gun was admissible under party admission exception to hearsay rule.

23. **Homicide** ⇐305

Trial court properly instructed jury that defendant could be convicted of capital murder if evidence establishes that defendant jointly participated in fatal shooting, though deaths were caused by firearm, where ac-

complice testified that both he and defendant shot one of victims, and medical examiner testified that victim's death was caused by three gunshot wounds.

24. Criminal Law ⇐1130(3)

Supreme Court would not consider arguments presented in trial court that were simply incorporated by reference in defendant's appellate brief.

25. Homicide ⇐234(5)

Evidence was sufficient to support defendant's convictions for capital murder, though there was evidence that accomplice fired first shot, where defendant fired remaining shots into victim's body, medical examiner testified that one of victims was killed by combination of three shots, and evidence amply supported factual finding that defendant killed both victims as part of same acts or transactions of robbing them and raping one of them.

26. Homicide ⇐235

Evidence that defendant went to victims' house intending to rob them and, while committing robbery, he and accomplice raped one of victims, and that they killed victims because defendant did not want to leave witnesses amply supported conclusion that robberies, rape, and subsequent murders were so closely related in time, place and causal connection as to make killings, as matter of law, part of same criminal enterprise. Code 1950, § 18.2-31, subd. 5.

27. Double Jeopardy ⇐150(1)

Defendant was not put in double jeopardy by his conviction of five charges of capital murder when only two people were killed, where jury fixed only one death sentence for each victim. U.S.C.A. Const.Amend. 5.

28. Criminal Law ⇐438(6, 7)

Trial court did not abuse its discretion in admitting photographs of four victims in unadjudicated crime to establish defendant's future dangerousness and to corroborate testimony of defendant's brother on defendant's confession that he shot and killed the four men; fact that autopsy reports reflected same facts as photographs did not make photographs inadmissible.

29. Criminal Law ⇐438(1), 675

Decision whether to admit photographic evidence of crime establishing same facts as another exhibit is within sound discretion of trial court.

30. Criminal Law ⇐438(7)

Introduction of pictures of charred bodies of victims in another crime did not inflame jury, compelling them to impose death penalty, where there was no evidence in record to indicate that jury disregarded trial court's instruction to consider photographs only for purposes of showing defendant's future dangerousness.

31. Criminal Law ⇐986.6(3)

Testimony of victim's mother during sentencing hearing as to her daughter's age and marriage to second victim and her identification of photograph of victims was not inadmissible victim impact evidence; record did not disclose that victim's mother displayed any particular emotion during short period of her testimony.

32. Criminal Law ⇐1208.1(5)

Defendant's mitigating evidence at death sentencing hearing that defendant suffered from childhood mental disorder known as attention deficit hyperactivity disorder, that his mother had several unpleasant relationships with men, and that his family members indicated that he was caring, loving, generous, and dependable person did not compel jury to impose life sentences rather than capital punishment. Code 1950, § 17-110.1.

33. Homicide ⇐357(6, 11)

Defendant's death sentences, based on findings of future dangerousness and vileness, were not excessive or disproportionate to penalties imposed by other sentencing bodies in Commonwealth for similar conduct, where defendant was sole participant in another case involving multiple murders and arson, and defendant suggested committing robberies, rape and execution-type killings of victims and arson of their house in case for which he was being sentenced. Code 1950, § 17-110.1, subd. C, par. 2.

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R. [illegible]d Ford, Jr. (Lucretia A. Carrico, Hayes & Carrico, on brief), for appellant.

Donald R. Curry, Sr. Asst. Atty. Gen. (James S. Gilmore, III, Atty. Gen., on brief), for appellee.

Present: COMPTON, STEPHENSON, WHITING, LACY, HASSELL and KEENAN, JJ., and HARRISON, Retired Justice.

WHITING, Justice.

Michael Wayne Williams was tried upon indictments charging him with 12 felonies arising out of the February 27, 1993, murders of Morris C. Keller, Jr., and his wife, Mary Elizabeth Keller, in Cumberland County. Five indictments charged Williams with the capital murders of Mr. and Mrs. Keller, two of which charged their murders in the course of a robbery while armed with a deadly weapon, Code § 18.2-31(4), two of which charged the Kellers' murders subsequent to the rape of Mrs. Keller, Code § 18.2-31(5), and the fifth indictment charged the killing of the Kellers as a part of the same act or transaction, Code § 18.2-31(7). The seven remaining indictments charged Williams with Mrs. Keller's rape, the burglary and arson of Mr. Keller's house, and the robberies and abductions of the Kellers.

In the first stage of a bifurcated trial conducted pursuant to Code §§ 19.2-264.3 and -264.4, a jury convicted Williams of all 12 charges and fixed his punishments on the non-capital convictions. In the second stage of the trial of the capital murder charges, the jury fixed Williams's punishments for the capital murder of Mrs. Keller at death and for the capital murder of Mr. Keller at death, based on its findings of "future dangerousness" and "vileness." The court then referred the matter to the probation officer for an investigation and report pursuant to the provisions of Code § 19.2-264.5. After considering the probation officer's report, the court imposed the jury sentences.

Williams appeals only his capital murder convictions. We have consolidated his appeal with our automatic review of his death sentence under Code § 17-110.1(A).

EVIDENCE

A substantial part of the Commonwealth's evidence comes from the testimony of Jeffrey Alan Cruse, Williams's confederate in these crimes. Pursuant to established principles of appellate review, we will view the evidence and all reasonable inferences arising therefrom in the light most favorable to the Commonwealth, the prevailing party at trial.

Between 9:30 and 10:30 p.m., on Saturday, February 27, 1993, Verena Lozano James drove Williams and Cruse to a rural area in Cumberland County and left them approximately one-half mile from Bear Creek Market. Williams and Cruse planned to rob persons in the market with a .357 caliber Ruger Black Hawk revolver that Williams had given to Cruse.

The two men walked to the store, but found it closed. Williams suggested that "he knew a house where we can go; they'd have a couple thousand dollars." Cruse agreed, and they walked some distance to the Kellers' house. Upon arrival at the Kellers' house, Cruse returned the Black Hawk revolver to Williams and Cruse knocked on the door. When Mr. Keller opened the door, Williams pointed the gun at him and both men entered the house.

Williams ordered the Kellers to remove all their clothes, and he remained in the kitchen with them while Cruse began searching the house for money and other valuables. After Cruse found a fully loaded .38 caliber handgun, Williams decided "to tie [the Kellers] up," and Cruse did so. The Kellers were then placed, first in one closet and later in separate closets, and both men resumed their search.

After the two men had assembled some of the Kellers' property in the living room, at Williams's suggestion, first Williams, then Cruse, raped Mrs. Keller. Afterward, Williams ordered both Kellers to take showers and put on clean clothes, which they did. Williams then directed the Kellers to "take a walk" with them. Upon hearing that the two men planned to burn the house, Mrs. Keller took the Kellers' marriage certificate with her. As the Kellers, Williams, and Cruse left

. house and walked "[d]own on a dirt road and into a thicket," Williams was carrying the .38 caliber handgun and Cruse was carrying the Black Hawk revolver.

When they were in the thicket with Williams standing behind Mr. Keller and Cruse standing behind Mrs. Keller, Williams said, "We'll shoot at the count of three." Upon Williams's count of three, he shot Mr. Keller with the .38 caliber handgun and Mr. Keller fell to the ground. However, Cruse did not shoot Mrs. Keller. Williams told Cruse to shoot Mrs. Keller because "he didn't want to leave no witnesses." Cruse then shot Mrs. Keller once with the Black Hawk revolver. After Mrs. Keller fell, Mr. Keller stood up and Williams shot him again with the .38 caliber handgun. As Cruse started to walk away, Williams said, "Wait ... [w]hat if they ain't dead?", and he shot each of the Kellers "a couple more times apiece" with the .38 caliber handgun.

The two men returned to the house, where they loaded a television set, microwave oven, shotgun, stereo set, and speakers into Mr. Keller's jeep, and, at Williams's suggestion, set fire to the house. Williams and Cruse then took the jeep to Fredericksburg, where they sold some of the stolen property the next day. They then threw the remaining stolen property and the Black Hawk revolver into the Rappahannock River and set fire to the jeep.

Upon hearing of the Keller fire on Monday morning, Verena James advised the police that she had taken Williams and Cruse to an area not far from the Keller house on the night of the fire. Consequently, the police sought to question the two men regarding the fire. Williams and Cruse had returned to Cumberland County the Monday following the murders and the police were able to question Cruse. Williams, however, fled to Florida.

At first, Cruse furnished no information of value to the police. However, after the police discovered the bodies of the Kellers on Tuesday, Cruse consulted counsel. His counsel obtained a conditional agreement from the Commonwealth that it would not seek the death penalty provided Cruse gave a truthful statement of his knowledge of the cri Cruse then furnished information that implicated both men in all of the crimes charged, except for Cruse's role in Mrs. Keller's rape. Because Cruse breached his agreement in failing to tell the police that he had raped Mrs. Keller, the Commonwealth also indicted him for the Kellers' capital murders.

Testifying in his own defense, Williams agreed with Cruse: (1) that Williams was the one who suggested robbing persons at the store; (2) that Williams was the first one to shoot Mr. Keller and that Cruse was the first one to shoot Mrs. Keller; and (3) that it was Williams's idea to burn the Keller house. However, Williams (1) denied that he raped Mrs. Keller, (2) claimed that Cruse fired all the subsequent shots into the Kellers' bodies, and (3) contradicted other details of Cruse's testimony about who had suggested some of their activities during and after the murders.

Lisa C. Schiermeier, a serologist, tested the seminal fluid recovered from Mrs. Keller's vagina as a part of the Physical Evidence Recovery Kit prepared by Dr. Deborah Kay, an assistant chief medical examiner who performed the autopsy on Mrs. Keller. Schiermeier compared that sample with the blood types of Cruse, Williams, and Mr. Keller. Schiermeier testified that her comparison indicated only Williams could have contributed a certain type of seminal fluid found in the sample. Dr. George C. Li, a DNA expert who performed a DNA test on the spermatozoa from the sample, testified that his test results were consistent with a conclusion that Cruse and Williams jointly contributed the seminal fluid.

II. ISSUES PREVIOUSLY DECIDED

Williams raises a number of issues that we have previously decided adversely to his contentions. Williams offers no persuasive reasons to modify our previous conclusions, and we perceive none. Hence, we will adhere to our previous rejections of those contentions and will not discuss them beyond citing representative cases expressly rejecting these contentions. The first group of contentions involves Williams's claims of the unconstitu-

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PREVIOUSLY DECIDED

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The first group of contentions
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ity of the capital murder and death penalty statutes for the following reasons:

A. The statutes do not give meaningful guidance to a jury because they do not require the jury to find that aggravating circumstances outweigh mitigating ones before fixing the death penalty. Rejected in *Breard v. Commonwealth*, 248 Va. 68, 74, 445 S.E.2d 670, 674–75 (1994), and *Mickens v. Commonwealth*, 247 Va. 395, 403, 442 S.E.2d 678, 684 (1994).

B. As written and administered, the statutes fail to adequately inform the jury that a death sentence may be imposed only upon a finding beyond a reasonable doubt that aggravating circumstances outweigh mitigating ones. Rejected in *Watkins v. Commonwealth*, 229 Va. 469, 490–91, 331 S.E.2d 422, 438 (1985), *cert. denied*, 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986).

C. The statutes fail to provide the sentencer with sufficient guidance as to aggravating factors to assure that the death penalty is not imposed in an arbitrary and capricious manner. Rejected in *Mickens*, 247 Va. at 402–403, 442 S.E.2d at 683–84.

D. The "future dangerousness" aggravating factor in the statutes is inherently misleading since it asks jurors to find a probability beyond a reasonable doubt. Rejected in *Mickens*, 247 Va. at 402–403, 442 S.E.2d at 684; *M. Smith v. Commonwealth*, 219 Va. 455, 477–78, 248 S.E.2d 135, 148–49 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979).

E. That part of the statute, Code § 19.2-264.4(C), which allows the sentencer to find the "future dangerousness" predicate based on unadjudicated criminal conduct, violates the Eighth and Fourteenth Amendments. Additionally, if evidence of such conduct is admissible, the jury should have been instructed that it could only be considered if established beyond a reasonable doubt. Both contentions are rejected in *Breard*, 248 Va. at 74–75, 445 S.E.2d at 675, and in *Satcher v. Commonwealth*, 244 Va. 220, 228, 421 S.E.2d 821, 826 (1992), *cert. denied*, — U.S. —, 113 S.Ct. 1319, 122 L.Ed.2d 705 (1993).

F. The "future dangerousness" aggravating factor in the statutes is inherently unreliable insufficient to guide jury discretion. ...jected in *Satcher*, 244 Va. at 227, 421 S.E.2d at 826, and *M. Smith*, 219 Va. at 477–78, 248 S.E.2d at 148–49.

G. The statutes as administered are unconstitutional because the infrequency of the imposition of the death penalty indicates that it is imposed arbitrarily and disproportionately upon black defendants, and the death penalty is repugnant to evolving standards of decency. Rejected in *Satcher*, 244 Va. at 228, 421 S.E.2d at 826.

H. As applied, the statutes are unconstitutional because they deny "meaningful appellate review and there is arbitrary administration of the state created right to proportionality and passion/prejudice review." Rejected in *Mickens*, 247 Va. at 405, 442 S.E.2d at 685.

I. Additionally, Williams argues in conclusional fashion that the statutes violate the Eighth Amendment prohibition against cruel and unusual punishment, the Sixth Amendment right to a fair trial, and the Fourteenth Amendment prohibition against deprivation of a defendant's life without due process. We have rejected each of these claims in the following cases: *Beaver v. Commonwealth*, 232 Va. 521, 527, 352 S.E.2d 342, 345–46, *cert. denied*, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987) (claim of cruel and unusual punishment); *Boggs v. Commonwealth*, 229 Va. 501, 514, 331 S.E.2d 407, 417 (1985), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 347 (1986) (claim of denial of Sixth Amendment right to fair trial); and *Stamper v. Commonwealth*, 220 Va. 260, 267, 257 S.E.2d 808, 814 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980) (claim of lack of due process).

Williams's second group of contentions that have been previously rejected by this Court involves the following:

A. The court erred in denying his motions for individual and sequestered *voir dire* examination of prospective jurors and for additional peremptory juror challenges. Rejected in *Breard*, 248 Va. at 75, 445 S.E.2d at 675, and *Swann v. Commonwealth*, 247 Va. 222, 228, 441 S.E.2d 195, 200 (1994).

...R. The court erred in failing to provide ...ional discovery beyond that required under Rule 3A:11. Rejected in *Spencer v. Commonwealth*, 238 Va. 295, 303–304, 384 S.E.2d 785, 791–92 (1989), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1171, 107 L.Ed.2d 1073 (1990).

III. ISSUES PROCEDURALLY DEFAULTED

[1, 2] We will not consider Williams's present objections to the exclusion of prospective jurors Thomas J. Langhorne, Bobbie Holman, and Mary D. Trent because Williams did not object to their exclusion at trial. Rule 5:25. Nor will we consider Williams's present objections to the court's grant and refusal of certain penalty phase jury instructions because the record does not indicate that Williams objected to these actions by the court. *Id.*

IV. WAIVER OF CERTAIN CONTENTIONS

Williams did not brief, and has therefore waived, assignments of error 10 and 24. Rule 5:27(e).

Also, in his brief, Williams attempts to "incorporate by reference" a number of arguments he made in the trial court for consideration on appeal. We will not consider these arguments since they must be made in the appellate briefs. *See Mickens*, 247 Va. at 401 n. 4, 442 S.E.2d at 683 n. 4, and *Jenkins v. Commonwealth*, 244 Va. 445, 460–61, 423 S.E.2d 360, 370 (1992), *cert. denied*, — U.S. —, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993) (arguments made in trial court cannot be considered on appeal merely by reference thereto in appellate brief).

V. PRETRIAL MOTIONS

Motion for Bill of Particulars

Williams filed a motion for a bill of particulars seeking, among other things, to require the Commonwealth to "identify every narrowing construction of [the "vileness"] factor on which it intends to offer evidence." The death penalty may be imposed if the defendant's "conduct in committing the offense [punishable by death] was outrageously or wan... vile, horrible or inhuman, *in that it* involved ...*rture, depravity of mind or aggravated battery to the victim.*" Code § 19.2-264.4(C) (emphasis added). The necessary narrowing constructions are contained in the emphasized language of Code § 19.2-264.4(C). *See M. Smith*, 219 Va. at 478, 248 S.E.2d at 149 ("depravity of mind" and "aggravated battery" construed).

[3] However, Williams contends that due process requires his pretrial notification of every one of these constructions upon which the Commonwealth will rely at trial. Williams makes this same argument in support of his contention that the "vileness" predicate in the death penalty statutes is unconstitutional.

[4] We find no merit in his arguments. In our opinion, due process does not require that the Commonwealth limit itself to a pretrial construction of the character of Williams's conduct. Furthermore, Williams has no constitutional right to a bill of particulars if the indictments are sufficient to give him notice of the nature and character of the offenses charged, which these indictments do, so that he can make his defense. *Strickler v. Commonwealth*, 241 Va. 482, 490–91, 404 S.E.2d 227, 23..., *cert. denied*, 502 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991); *Spencer v. Commonwealth*, 238 Va. at 303–304, 384 S.E.2d at 791.

Motion for Change of Venue

[5] Williams contends that the court should have granted his motion for change of venue because of the prejudicial pretrial publicity of (1) Cruse's account of the Keller murders, and (2) four other recent murders in which Williams was allegedly involved. Those murders had occurred on December 24, 1992, in the nearby town of Rice, which is in Prince Edward County. The bodies of four men were discovered in the ruins of the house where they were shot. The house apparently had been deliberately burned following their murders.

[6, 7] Williams has the burden of showing that there was widespread prejudice against him in Cumberland County which would be

...onably certain to prevent a fair trial." *...ler v. Commonwealth*, 244 Va. 386, 395, 422 S.E.2d 380, 388, *cert. denied*, — U.S. —, 113 S.Ct. 1880, 123 L.Ed.2d 498 (1993). The decision whether to grant a change of venue is within the sound discretion of the trial court, and such decision will not be disturbed on appeal absent an abuse of that discretion. *Id.*

Williams does not claim, nor does the record disclose, that the pretrial publicity was inaccurate or that it was difficult to empanel the jury. And of the 37 prospective jurors who were examined, only 4 were required to be excused because they had formed an opinion of Williams's guilt based on the pretrial publicity. Given these circumstances, we find no abuse in the court's discretion in denying Williams's motion for a change of venue.

Motion for Assistance of Private Investigator

[8] Williams, an indigent, contends that the court erred in denying his pretrial motion for the appointment of a private investigator to assist his counsel in his defense. Williams asked the court to delay a ruling on that motion until he was furnished with information that the Commonwealth was to produce in response to his discovery motions. When Williams sought a ruling after completion of discovery, his request was confined to (1) an investigator's assistance in procuring information regarding a change of venue, and (2) mitigation evidence.

However, on appeal, Williams argues that this assistance was required to investigate (1) Cruse's credibility, and (2) the evidence of the Prince Edward County crimes which would be considered in the penalty phase on the issue of Williams's future dangerousness. We will not consider Williams's present arguments because they were not made in the trial court. Rule 5:25.

VI. JURY SELECTION

Limitation of Voir Dire

[9] Williams argues that the court improperly limited his *voir dire* examination by refusing to permit him to ask prospective jurors ...t their "perceptions on parole law." ...ams concedes that he was not ineligible for parole when this case was tried. Accordingly, the trial court ruled correctly that Williams was not allowed to inject issues of parole in his *voir dire* questions. *Ramdass v. Commonwealth*, 248 Va. 515, 520, 450 S.E.2d 360, 361 (this day decided); *Wright v. Commonwealth*, 248 Va. 485, 486, 450 S.E.2d 361, 362 (this day decided).

Retention and Exclusion of Prospective Jurors

Gary Davis

[10] Williams contends that the trial court applied the wrong standard in refusing to disqualify prospective juror Davis. During *voir dire*, Davis said that it would be "tough" to "overlook the death penalty" and impose a life sentence if the Commonwealth proved the aggravating circumstances. According to Williams, the trial court "erroneously applied a standard which would disqualify prospective jurors only if they would *automatically* vote for the death penalty."

However, Williams voiced no such contention in the trial court. Accordingly, we will not consider this contention on appeal. Rule 5:25.

Sharon Barrett Baldwin

[11, 12] Williams complains that the court erroneously excluded prospective juror Baldwin. In deciding whether to exclude a prospective juror, the trial court must determine whether the prospective juror's views "'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Eaton v. Commonwealth*, 240 Va. 236, 246, 397 S.E.2d 385, 391 (1990) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)), *cert. denied*, 502 U.S. 824, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991). And, in considering this matter on appeal, we defer to the trial court's decision because the trial judge has seen and heard the prospective jurors and is in a better position than we are to rule on these issues. *Breard*, 248 Va. at 77, 445 S.E.2d at 676. Accordingly, we

will not reverse the ruling on appeal in the absence of a showing of "manifest error." *Eaton*, 240 Va. at 246, 397 S.E.2d at 391.

Baldwin testified that she would automatically refuse to impose the death penalty because of her religious beliefs, and that she would not consider the court's directions to consider a death sentence as well as a "life" sentence. Her final answer was that she "would have a very, very hard time [considering the death penalty]." Considering Baldwin's expression of her religious beliefs and her apparent reluctance to consider the court's directions, we find no manifest error in excusing her.

VII. GUILT PHASE

Failure to Grant Mistrial

[13] Verena James testified that she had received a monetary reward for supplying evidence about the Keller fire. She was then asked if she knew of such a reward before she supplied her information to the police. She responded, "No. Through the media I had heard about the Rice fires." This unresponsive answer was an apparent reference to the four recent murders and the arson of the house in Rice.

According to Williams, this information "impermissibly placed before the jurors, at the guilt phase of the trial, the unadjudicated acts of murder." However, there is no contradiction in the record of the trial court's observation that "[n]othing was said about connecting this gentleman with anything about the Rice fires."

Moreover, Williams declined the court's offer to instruct the jury to disregard that testimony. Under these circumstances, we find no abuse of discretion in the court's refusal to declare a mistrial.

Admission of Photographs of Victims and Crime Scene

[14] Williams complains of the allegedly excessive and, therefore, prejudicial number of photographs of the Kellers' bodies at the scene of their murders. Six photographs, some taken from a distance and others taken from a point closer to the bodies, all with different views of the bodies, were introduced in evidence.

The well-established rule is that admission into evidence of "photographs depicting victims and the crime scene is a matter resting within the sound discretion of the trial court." *Breard*, 248 Va. at 82, 445 S.E.2d at 676. We find no abuse of that discretion in the admission of these photographs.

Alleged Errors During Cruse's Testimony

Williams contends that the trial court erred in three rulings during Cruse's testimony. We find no merit in any of these contentions.

[15, 16] First, Williams contends that by allowing Cruse to testify on direct examination that he had no plea agreement with the Commonwealth in exchange for his testimony, the court improperly permitted the Commonwealth "to bolster" Cruse's testimony on direct examination. Williams correctly points out that ordinarily evidence of a witness's credibility is not admissible until the witness's credibility is attacked. *See Jordan v. Taylor*, 209 Va. 43, 48–49, 161 S.E.2d 790, 794 (1968) (improper to elicit testimony from witness tending to bolster that witness's credibility).

[17] However, the order of proof in a trial is a matter committed to the sound discretion of the trial court, and we will not reverse a ruling varying the order of proof in the absence of an abuse of discretion. *Quintana v. Commonwealth*, 224 Va. 127, 142, 295 S.E.2d 643, 650 (1982), *cert. denied*, 460 U.S. 1029, 103 S.Ct. 1280, 75 L.Ed.2d 501 (1983) (sustaining admission of evidence in rebuttal phase of case more appropriately admissible in case-in-chief); *Hargraves v. Commonwealth*, 219 Va. 604, 608, 248 S.E.2d 814, 817 (1978) (permitting Commonwealth to reopen case after it rested and court heard defendant's motion to strike Commonwealth's evidence). Since Williams advised the court that he planned to attack Cruse's credibility, we find no abuse of that discretion in this case.

[18] Next, Williams argues that the court erred in admitting part of Cruse's testimony. Cruse had testified on direct examination

ne was being prosecuted for capital murder arising from the Keller incidents. On cross-examination, Cruse was asked whether he was testifying "to help [him]self in making [his] case." Cruse responded, "I'm getting it off my chest." Cruse was then asked whether he was "also getting the death penalty off [his] back." Cruse simply responded, "Not really."

Over Williams's objection, Cruse testified on redirect examination that he was unable to look at the pictures of the murder scene because he "lost it." In our opinion, evidence that Cruse was upset by the pictures was appropriate corroboration of his testimony that he wanted to "get it off [his] chest," and, therefore, proper rebuttal to the suggestion that he was "getting the death penalty off [his] back."

[19] Williams's final contention regarding Cruse's testimony is that the court erred in refusing to permit Williams to show Cruse's conviction of an assault and battery. Williams recognizes that because misdemeanor assaults and batteries are not crimes of moral turpitude, evidence of convictions of those crimes is not admissible to attack a witness's credibility. *Clark v. Commonwealth*, 202 Va. 787, 790, 120 S.E.2d 270, 272 (1961). However, because he claims that Cruse's credibility and "proclivity for assaultive behavior was a crucial factor for the jury to decide," Williams contends that this evidence should have been admitted. However, he cites no supporting authority.

Clark states the applicable rule:

> The rule is well settled in Virginia that a witness cannot be asked on cross-examination questions as to collateral independent facts irrelevant to the issue being tried, though bearing on the question of veracity, for the purpose of testing his credibility.

Id. at 789, 120 S.E.2d at 272. We see no reason to create the suggested exception to this rule. Cruse admits he fired the first shot at Mrs. Keller, thereby virtually eliminating any doubt of his "proclivity for assaultive behavior." Accordingly, the trial court correctly excluded this testimony as an inadmissible attack upon Cruse's credibility.

7 my of Tammy Lynn Tolley

[20] Williams maintains that the court erred in the manner in which it permitted Tammy Lynn Tolley to identify him as one of the two men from whom she bought some of the Kellers' property on the day after the Kellers were murdered. When Tolley began testifying, she could not identify Williams by looking at persons in the courtroom. However, over Williams's objection, she identified a photograph of him that had been shown to her shortly after she had bought some of the stolen property.

Later, while responding to a question on another subject, Tolley volunteered, "That's the guy right over there. I didn't see him sitting over there." The Commonwealth's attorney responded, "After looking at him, she identified him," and Tolley said, "I mean, I looked out there. I didn't look up here."

We do not agree with Williams's contention that this was another effort "to rehabilitate" the witness prior to cross-examination. Rather, it was a permissible examination to establish that, on a prior occasion, Tolley had identified Williams as one of the men from whom she bought some of the Kellers' property.

Alleged Improper Cross-Examination of Williams

[21] The witnesses had been excluded from the courtroom when not testifying. Williams contends that the trial court erred in permitting the Commonwealth to ask Williams on cross-examination whether he was the only witness who had been present in the courtroom and heard the testimony of witnesses who had already testified.

According to Williams, this question "impermissibly burdened Williams' [constitutional] right to confront his accusers, to be present at all times during his trial, to present evidence in his favor and to compel process." However, Williams cites no case in which such a question has been held to violate a defendant's constitutional rights, and we find none. We fail to see how those rights are violated by a question that reflected what the jury already knew. Accordingly, we find no merit in this contention.

Admission of Williams's Out-of-Court Statement

[22] Officer John Richard Holt brought Williams back to Cumberland County from Georgia, where Williams was arrested. During the return trip, Holt answered a number of Williams's questions.

Holt testified during the Commonwealth's case-in-chief that in response to Williams's questions, Holt told Williams that the Black Hawk revolver had been recovered from the Rappahannock River. When Williams later asked what Cruse had told the police about the Keller incidents, and Holt said that Cruse had "told us the whole story," Williams responded, "I can prove Jeff had that goddamn Black Hawk."

Willams contends that the court erred in permitting the last out-of-court hearsay statement by Williams. We disagree. Although Williams may have thought that his statement was exculpatory, the statement linked him to the Keller incidents and was thus admissible as a party admission exception to the hearsay rule. *Stewart v. Commonwealth*, 245 Va. 222, 236, 427 S.E.2d 394, 403, *cert. denied*, — U.S. —, 114 S.Ct. 143, 126 L.Ed.2d 105 (1993) (statement to witness prior to defendant's wife's murder that defendant had consulted counsel regarding divorce admissible under party admission exception to hearsay rule).

Instructions

[23] Williams contends that the court erred in granting Instruction 18 which told the jury that:

> You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal shooting, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death.

In *Strickler*, we noted that "where two or more persons take a direct part in inflicting fatal injuries, each joint participant is an 'immediate perpetrator' for the purposes of the capital murder statutes." 241 Va. at 495, 404 S.E.2d at 235. However, Williams contends that *Strickler* is distinguishable from this case because in *Strickler* two persons used a heavy rock to kill the victim. Here, Williams notes that "the deaths were caused by a firearm which only requires the action of one person in pulling the trigger."

However, Williams overlooks Cruse's testimony that both he and Williams shot Mrs. Keller in the head, that Cruse used the Black Hawk revolver, and that Williams used the .38 caliber handgun. He also overlooks the testimony of Dr. Kay. Although Dr. Kay testified that any one of Mrs. Keller's three facial wounds "could" have been lethal, she concluded in her autopsy report that Mrs. Keller's death was caused by three "[g]unshot wounds of face."

Accordingly, the jury could have found from the evidence that Williams and Cruse each took a direct part in inflicting Mrs. Keller's fatal injuries. Hence, the instruction was proper for that reason.

[24] Next, in assignment of error 28, Williams contends that the court erred in refusing his tendered Instructions 19 and 20. However, he merely "incorporates by reference" the argument he made in the trial court in support of his present contention. As we have noted earlier, we will not consider arguments presented in the trial court that are simply incorporated by reference in an appellate brief. Accordingly, Williams has waived this contention.

Sufficiency of Evidence

[25] Williams maintains that the evidence is insufficient in several respects to support his convictions for capital murder. First, he claims that Cruse killed Mrs. Keller with the first shot. However, as we have noted earlier, Dr. Kay's testimony was sufficient to indicate that Mrs. Keller was killed by the combination of the three shots to her face.

Next, Williams argues that the evidence is insufficient to show that he killed Mr. Keller since Mr. Keller stood up after Williams shot him. However, even if Williams did not kill Mr. Keller on the first shot, the jury could have found that Williams did so later when, according to Cruse, Williams fired the remaining shots into Mr. Keller's body.

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Thus, in our opinion, there is sufficient evidence to support the jury's finding that Williams had actively participated in the murders of both Mr. and Mrs. Keller. Additionally, the evidence amply supports the factual finding that Williams killed both Kellers as a part of the same acts or transactions of robbing them and raping Mrs. Keller.

[26] As his final argument on the sufficiency of the evidence, Williams contends that the "predicate felonies of rape and robbery were not sufficiently close in time and place to the murders of Mr. and Mrs. Keller to elevate those murders to capital murder." We disagree.

The evidence indicates that Williams and Cruse went to the Kellers' house intending to rob them and, while committing the robbery, they raped Mrs. Keller. The evidence also shows that they killed the Kellers because Williams "didn't want to leave no witnesses." In our opinion, this evidence amply supports the conclusion that the robberies, the rape, and the subsequent murders were "so closely related in time, place, and causal connection as to make the killing[s], as a matter of law, a part of the same criminal enterprise." *Briley v. Commonwealth*, 221 Va. 532, 544, 273 S.E.2d 48, 56 (1980), *cert. denied*, 451 U.S. 1031, 101 S.Ct. 3022, 69 L.Ed.2d 400 (1981).

Additionally, one of the specifically defined acts of capital murder is the "willful, deliberate, and premeditated murder of any person, in the commission of, or subsequent to, rape." Code § 18.2-31(5). There is no doubt that the Kellers were murdered shortly after Mrs. Keller's rape. Accordingly, we conclude that the evidence is sufficient to sustain Williams's capital murder convictions.

Alleged Double Jeopardy Violation

[27] Williams contends that he was put in double jeopardy by his conviction of five charges of capital murder when only two people had been killed, thereby violating the proscriptions against double jeopardy contained in the Fifth Amendment of the Constitution of the United States, Article I, Section 8 of the Virginia Constitution, and Code § 19.2-294. We disagree.

ed not consider whether Williams was charged with multiple offenses arising from the same act or offense since he was prosecuted for those offenses in the same trial. *Blythe v. Commonwealth*, 222 Va. 722, 725, 284 S.E.2d 796, 798 (1981). We are concerned only with his constitutional and statutory rights not to be subjected to multiple punishments for the same act or offense. *Thomas v. Commonwealth*, 244 Va. 1, 9, 419 S.E.2d 606, 610, *cert. denied*, — U.S. —, 113 S.Ct. 421, 121 L.Ed.2d 343 (1992). Here, although Williams was convicted of five charges of capital murder, each based separately upon proof beyond a reasonable doubt, the jury fixed only one death sentence for each victim. Under these circumstances, Williams was not subjected to multiple punishments for what he claims was the same act or offense. *Id.*

VIII. PENALTY PHASE

Admission of Photographs of Other Murders

Williams confessed to John Howard Williams, his brother, that he had shot and killed the four men and set fire to the house in Rice. The court permitted the Commonwealth to introduce photographs of each victim's head showing that each had been shot in the head and that parts of the head were partially burned.

[28] The Commonwealth claimed that the photographs were relevant not only to establish Williams's future dangerousness by indicating the atrociousness of the Prince Edward County murders, but also to corroborate the testimony of John Williams as to Williams's confession to him. The court admitted the photographs over Williams's objection that the four victims' autopsy reports, which were admitted in evidence, showed the same things that the photographs did and that the photographs were inflammatory. The parties make the same arguments on appeal.

[29] The fact that the autopsy reports reflect the same facts as the photographs does not make the photographs inadmissible. *See Spencer*, 238 Va. at 312, 384 S.E.2d at 796 (even though videotape of crime scene

admitted in evidence, still photographs of crime scene also admissible). And the decision whether to admit photographic evidence of the crime establishing the same facts as another exhibit is within the sound discretion of the trial court. *Id.* at 312, 384 S.E.2d at 796. We think that the photographs were relevant for the reasons advanced by the Commonwealth, and we find no abuse of the trial court's discretion in admitting them in evidence.

Passion, Prejudice, or Other Arbitrary Factor

[30] Williams argues that the introduction of "[t]he pictures of the charred bodies of the victims of the Prince Edward [County] killings" inflamed the jury so that "there was no question but that the jury would impose the death penalty after viewing them." However, we find nothing in the record to indicate that the jury disregarded the trial court's instruction to consider the photographs only for the purpose of showing Williams's "future dangerousness" in deciding the Cumberland County case.

[31] Additionally, Williams claims that "the passion and prejudice of the jury were further aroused by the Commonwealth's calling family members to testify during the sentencing hearing." We note that Mary Carter Williams, Mrs. Keller's mother, was the only family member called as a witness by the Commonwealth during the sentencing hearing. Mrs. Williams testified only as to her daughter's age and marriage to Mr. Keller and identified a photograph of the Kellers. The record does not disclose that Mrs. Williams displayed any particular emotion during the short period of her testimony.

Williams concludes that this was an indirect method of introducing inadmissible victim impact evidence, although Williams voiced no objection whatever to Mrs. Williams's testimony. We do not consider the testimony to have been victim impact evidence, nor does the record disclose that it aroused the passion of the jury, as Williams contends.

[32] Next, Williams suggests that the sentence was influenced by passion, prejudice, or other arbitrary factors because the jury imposed the death penalty despite his mitigating evidence. This evidence indicated that Williams suffered from a childhood mental disorder known as Attention Deficit Hyperactivity Disorder (A.D.H.D.), which adversely affected him in school and limited his ability to function in society as he matured. Dr. Dewey G. Cornell, a clinical psychologist, testified that persons suffering from A.D.H.D. are likely to be involved in substance abuse and engage in impulsive and sometimes illegal behavior.

Noting his own history, Williams contends that the effects of his disorder were exacerbated by his unstable home life and a sexual assault by an older man when Williams was 14 years old. Williams's mother, Carolyn Green Lipscomb, divorced his father shortly before he was born and married Arthur Williams, an alcoholic. Lipscomb divorced Arthur Williams after several years of verbal and emotional abuse. Thereafter, Lipscomb had several "relationships" with men, and Lipscomb testified that "not all [were] pleasant." However, one of those men, Dwayne Copeland, had a good "relationship" with Lipscomb, and she and Copeland planned to be married. When Copeland was killed in an automobile accident a few months before the planned marriage, Lipscomb testified that Williams was "devastated."

Williams points out that despite these difficulties, the testimony of his family members indicated that he was a caring, loving, generous, and dependable person who was not seen to be cruel or abusive to animals or to people. We have reviewed all of Williams's mitigating evidence and find nothing in it that would compel the jury to impose life sentences rather than death sentences.

Independent of Williams's specific complaints on this subject, we have also reviewed the record, as required by Code § 17–110.1, to ascertain if there is any indication that the jury, in imposing the death sentence, was influenced by passion, prejudice, or any other arbitrary factor. Our independent review discloses no such indication.

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o such indication.

Proportionality

[33] As required by Code § 17–110.1(C)(2), we also consider whether Williams's "death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the criminal." Prior to the Prince Edward County murders, Williams had no convictions for violent crimes, but he had several felony convictions for automobile theft and for possession of marijuana. However, we must also consider that Williams was the sole participant in the Prince Edward County murders and arson. Further, Williams suggested the robberies, the rapes, the execution-type killings of the Kellers, and the arson of their house. In our opinion, this evidence amply justifies the jury's finding of the "vileness" of the Keller murders and of Williams's "future dangerousness."

To assist us in our proportionality review, we have considered the compilation of the records of all capital murder cases reviewed by this Court pursuant to Code § 17–110.1(E). We have paid particular attention to those cases in which the death sentence was based on both the "vileness" and the "future dangerousness" predicates. These cases are collected in *Spencer*, 238 Va. at 319–20, 384 S.E.2d at 799–800. We have collected the cases since *Spencer* in *Mueller*, 244 Va. at 413–14, 422 S.E.2d at 397. Since *Mueller*, the following cases have imposed death sentences based on both predicates: *Burket v. Commonwealth*, 248 Va. 596, 450 S.E.2d 124 (this day decided); *Breard*, 248 Va. at 89, 445 S.E.2d at 682; and *Mickens*, 247 Va. at 412, 442 S.E.2d at 689.

Based upon our review of these records, as well as of cases in which life sentences were imposed, we conclude that Williams's death sentences are not excessive or disproportionate to the penalties imposed by other sentencing bodies in Virginia for similar conduct, considering both the crimes and the defendant.

IX. CONCLUSION

We find no reversible error in the judgments of the trial court, and we perceive no other reason to set aside the sentences of death. Accordingly, we will affirm the convictions and sentences involved in these appeals.

Affirmed.

Lonnie WEEKS, Jr.,

v.

COMMONWEALTH of Virginia.

Record No. 940335.

Supreme Court of Virginia.

Nov. 4, 1994.

Defendant was convicted in the Circuit Court, Prince William County, Herman A. Whisenant, Jr., J., of grand larceny and firearms charges, and capital murder, and was sentenced to death. On automatic death penalty review, the Supreme Court, Compton, J., held that: (1) two-hour detention while defendant was being questioned by police officers occurred pursuant to defendant's consent and defendant's questioning after prior invocation of right to remain silent did not violate his Fifth Amendment rights; (2) trial court did not err in refusing to dismiss juror for cause; (3) victim impact testimony is relevant to punishment in capital murder prosecution; and (4) death sentence was appropriate under the circumstances.

Affirmed.

1. Criminal Law ⇐1134(3)

On review of death sentence, court considers not only trial errors enumerated by defendant but also whether sentence of death was imposed under influence of passion, prejudice, or any other arbitrary factor, and whether sentence is excessive or disproportionate to penalty imposed in similar cases. Code 1950, § 17–110.1, subd. A.

COPY

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF CUMBERLAND

COMMONWEALTH OF VIRGINIA

v.

MICHAEL WAYNE WILLIAMS

THE HONORABLE JOHN R. SNODDY, JR., PRESIDING

Trial - Day One
Cumberland, Virginia
January 3, 1994

* * * * *

TEKKI H. SPRUCE
Court Reporter
P. O. Box 4238
Lynchburg, Virginia 24502

(804) 239-9672

Bonnie E. Stinnett; Ruby Trent Carter.

MR. FORD: For the record, too, I think sometimes the people up there just kind of nod their heads, and maybe if we could get them to respond yes -- I mean, even if they all jointly respond. I don't know whether the record is being picked up or not. I think Mr. Carnes just kind of sat there and --

THE COURT: Well, you don't have to worry about him now.

MR. FORD: I understand that, Judge.

THE COURT: I'll certainly ask them to.

(The three prospective jurors entered the Courtroom and were sworn by the Deputy Clerk.)

THE COURT: State your name.

MR. CHICK: Dwayne Chick.

THE COURT: What's your name?

MS. CARTER: Ruby Carter.

MS. STINNETT: Bonnie Stinnett.

THE COURT: Now, I want all of you all to answer these questions when you are asked questions. See, it has to go on the record, so speak up. If I ask you something, don't shake your head or anything, just answer yes or no. And if I ask you something else, to elaborate, then you can

do that. This involves, again, Commonwealth versus Michael Wayne Williams. He's charged with twelve felonies. Included is capital murder, or rather murder involved with rape. He's also charged with arson, and robbery, and abduction of Mr. and Mrs. Keller. And I have the following questions for you: Are you related by blood or marriage to the defendant, Michael Wayne Williams, or the alleged victims of these offenses, Morris C. Keller, Jr. and Mary Elizabeth Keller, or any of the attorneys, Mr. Woodson, Mr. Von Schuch, Mr. Ford, or Ms. Carrico?

JURORS: (No affirmative response.)

THE COURT: Are you related by blood or marriage to any of these people?

JURORS: (No affirmative response.)

THE COURT: Have any member of your immediate family ever been represented by the aforementioned attorneys?

JURORS: (Two have no affirmative response.)

MR. CHICK: Yes.

THE COURT: Who have you been represented by?

MR. CHICK: My daddy's been represented by --

THE COURT: I'm not talking about your daddy. I asked you if you had ever been represented.

MR. CHICK: Oh, no, sir.

THE COURT: Are you personally acquainted with

the defendant or were you personally acquainted with the deceased victims?

MR. CHICK: Yes, I knew them. They used to be my neighbors.

THE COURT: Who?

MR. CHICK: The Kellers.

THE COURT: Would that have any effect on your ability to serve as an impartial juror in this case?

MR. CHICK: No.

THE COURT: Have you or any member of your immediate family ever been the victim of a murder, robbery or rape?

JURORS: (No affirmative response.)

THE COURT: Do you have any interest in this trial or the outcome of the case?

MR. CHICK: Yes, I --

THE COURT: What?

MR. CHICK: I mean, yeah. Yes.

THE COURT: Gentlemen, do you have any suggestion?

MR. FORD: If I might talk with my client just a minute?

THE COURT: I don't want to taint the other jurors.

MR. VON SCHUCH: Judge, talking with Mr. Ford, I

thought we might do it mutually, but I think Mr. Ford would like to ask him just a few questions to verify some things before he agrees to anything. So I guess what we would do at this point is just go ahead and continue with the questioning and then --

THE COURT: Then we'll talk about that afterwards.

MR. FORD: That's fine, Judge.

THE COURT: Have you acquired any information about any of these offenses of the defendant, Michael Wayne Williams, from the news media or any other source? That is, have you read any reports on this case in any newspaper or heard any reports on this case either on the radio or television?

MS. STINNETT: I have not.

MS. CARTER: I've heard it on the radio and in the newspaper.

MR. CHICK: I've heard it on the radio.

THE COURT: Have you formed any opinion as to the guilt or innocence by virtue of what you have heard or read?

JURORS: (No affirmative response.)

THE COURT. Considering what you have read about this case, do you believe that you can enter the jury box with an open mind and wait until the entire case is

consideration of the evidence?

JURORS: (No affirmative response.)

THE COURT: Are any of you involved in law enforcement?

JURORS: (No affirmative response.)

THE COURT: Are any of you related to the following people who may be called as witnesses: Robert W. Scanlon; Lisa C. Schiermeier; Ann D. Jones; Deborah Kay; Robert R. Hallett; William Massello, III; John Howard Williams; George Li, Li; Special Agent R. A. Jenkins; Special Agent William C. Hicks; Special Agent Richard Holt; Special Agent James Tyree; Verena Ann James; Jose Albert Lozano; Barbara Waycaster Dunn; Robert Dean Ramey; Tammy Lynn Tolley; Elizabeth K. Jones; Sharon Lee Sine; David Edward Sine; Special Agent Wayne Hipkins; Jeffrey Alan Cruse; Deputy Sheriff Claude Meinhard; Special Agent Herbert Chambers; Special Agent James Adcock; Trooper John Evers; Glenn Haskins; Special Agent M. Joseph Ritchie; Mary Carter Williams; Raymond J. Williams; Patricia Costable Atkinson; Agnes Villalobos; Special Agent Barry Keesee; Agnes Devina Piper; Mary Nieves; Richard B. Horn, Jr.; Martha Keller; James Keller; Carolyn Lipscomb; John Williams; Warren Green; Janet McCoy; Laura St. John; Gwen Marshall; Arthur Howard Williams; Thomas Spry; Dr. Dewey Cornell?

we got to my mother's house, I took the .38 and I threw it in the woods. That's where the gun is now. I threw it in the woods behind the house.

Q At the point in the thicket, you're telling the Jury that you fired how many times?

A One time.

Q And with what weapon?

A The .38.

Q Have you ever been convicted of a felony?

A Yes, I have.

Q How many?

A Two felonies.

Q Have you ever been convicted of a misdemeanor involving lying, cheating or stealing?

A One.

MR. FORD: That's all I have.

CROSS EXAMINATION

BY MR. VON SCHUCH:

Q Mr. Williams, do you know what a Motion to Exclude Witnesses is?

A No, I do not.

Q Have you been watching the trial as we've been going along here?

A What, on T.V.?

Q No, right here in the courtroom.

A Pretty much, I mean.

Q Where have all the witnesses been coming from?

A Outside.

Q So that when the witness came in, they didn't get a chance to hear who testified before them, did they?

A What do you mean?

Q In other words, they were outside?

A Right.

Q So they didn't get a chance to hear who testified before them, did they?

A They did not.

Q And then they would testify and they'd go back out, wouldn't they?

A Yes, sir.

Q So none of those witnesses have heard anything that was said in this courtroom other than what they told this Jury; is that right?

A Right.

Q But that's not true in your case, is it?

A What do you mean?

Q You're the only witness who has sat in here through this trial and heard the testimony of every witness

before you got to testify; isn't that correct?

MR. FORD: Judge, I think that's --

THE WITNESS: Well, I had to.

MR. FORD: Excuse me. I think that's improper. He has a constitutional right to be here at all stages of the trial, and it was my Motion to Exclude Witnesses. He's trying to use that fact to convince this Jury that he has been exercising his constitutional rights to stay here and confront all of his accusers and see everybody, and I think that that's improper. I think it's improper.

MR. VON SCHUCH: Judge, I think he's giving me more credit than I'm entitled to.

MR. FORD: I apologize if I have.

MR. VON SCHUCH: I think the Jury ought to have pointed out to them that this witness had occasion to hear all of the other testimony before he testifies. His credibility is in issue and where his story comes from, they have a right to determine and decide.

MR. FORD: But I don't think you can beat him over the head with his constitutional rights. That's certainly a right of his.

THE COURT: Well, he can't beat him over the

head, certainly, for being in here, but he can ask him if he heard all the other testimony.

BY MR. VON SCHUCH: (Continuing)

Q And your answer to that question would be yes?

A Yes, sir.

Q Now, I think you've indicated to Mr. Ford you are a convicted felon?

A Yes, sir.

Q Two times?

A I think that's what it is, what my record said. I might be wrong. This is what my record said; that's what I saw.

Q Let me ask you this. You indicated that when you were picked up in Richmond, your brother came and picked you up; is that correct?

A Yes, sir.

Q And your brother's name is Johnny Williams?

A Yes, sir.

Q You indicated that you took him aside, I believe, outside the presence of Mr. Cruse?

A Me, him and Cruse walked over there.

Q Was Mr. Cruse present when you told your brother the first story about what happened?

Mr. Cruse had that goddamn .357." Now why does he do that? Because he knows that that .357 can be matched up with a bullet from Mrs. Keller. He knows that and he's going to put that .357 -- And that's the only time he's told you the truth. He's going to put it in Mr. Cruse's hand because he knows where the .38 is. We don't have the .38 today. That .38 is not here. He knows it, he knows the .38 is not here and that we have no way of getting ballistics on it.

But let me tell you something. He sat right here -- and he's got a right to do it -- and he listened to everybody. Mr. Cruse didn't have that right to sit here and listen to everybody. He came in and told you as it was and it was corroborated right down the line on everything he said. You heard the witnesses, honest witnesses, believable witnesses, that showed you that Mr. Cruse is believable. He's telling it like it is. And Mr. Williams had his right to sit in here and listen to everything that happened.

And guess what? After he listens to everything, after he's told Mr. Holt that, "I can put that goddamn .357 in Mr. Cruse's hand," what does he do? He gets on there and tells you, "Huh-uh, wait a minute. I'm going to change my story some now. He grabbed the .38 from me." He knows he's got to get that .38 out of his hand. He can't say he had that .38. Now he's telling you that

and you steal things, when you break into their cars and steal things, it's finding. That's what Michael Williams is like. Jeffrey Cruse is different. Not different enough that he wouldn't do the same things Michael Williams did, but different enough to feel bad about it, different enough to talk to the police about it.

He told you about an incident that occurred several weeks ago when I had laid out one of those pictures which you had seen of the Kellers in the woods. I asked him what happened and he said he lost it, and, boy, did he ever. And when he got on the witness stand here, he broke down again, when Mr. Ford pushed him and then when he was asked questions by me.

When he was arrested on that concealed weapon charge, and you heard the officers testify, there wasn't a single thing that they could have charged him with about these offenses, not a single thing, but he went ahead anyhow and told the police and got himself charged with it. Apparently Mr. Cruse feels bad. He at least has that much conscience. And that is a big difference between this (indicating defendant) and Mr. Cruse.

Mr. Ford is absolutely correct. When Mr. Cruse came down the first time, when he wanted to talk, when he told us, when we had no choice but to enter into that agreement, because anything he said we were going to

charge him with, because we didn't have any other way of charging him, and he did not tell about the rape and Mr. Woodson went back and tore up the agreement. And he sits here today facing the death penalty; he sits here facing capital murder, two counts of capital murder. And like he told you right now, his back is against the wall; if he lies, he dies, and that is his situation.

And that's where he's coming from when he comes into this courtroom. Now he's different, you see, from Mr. Williams, because Mr. Cruse's testimony makes Mr. Williams guilty of capital murder, makes him guilty of rape. If Mr. Williams does not lie, he is guilty of these offenses. There is a difference between the two of them. The last question I asked Mr. Williams on cross examination was, "The truth of it is, Mr. Williams, the truth of it is that if Jeff Cruse hadn't told on you, you wouldn't be here on trial today, would you?" And he said that's the truth.

Now where is Mr. Williams coming from? You don't think he doesn't have a motive to get back at Jeff Cruse? You don't think he doesn't sit there with that on his mind? If Jeff Cruse hadn't told the police what happened and hadn't taken them to the river, this man is walking around out there and he's still got his .38. Think about what's in Mr. Williams' mind when he's up here telling you this story.

(9) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear convincing evidence that but for constitutional error, no reasonable factfinder w have found the applicant guilty of the underlying offense.